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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 851

INDIANAPOLIS POWER & LIGHT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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STIPULATION CONCERNING RECORD

There is on file with the Clerk of the Supreme Court a stipulation concerning the record herein, which, omitting caption, and title, is as follows:

SUBJECT TO THIS COURT'S APPROVAL, IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that for the purposes of the petition for a writ of certiorari, the printed record may consist of the following:

1. Appendices A and B to petitioner's brief in the Court below.

2. Appendix to respondent's brief in the Court below.

3. The supplemental proceedings before the United States Circuit Court of Appeals for the Seventh Circuit, with the exception of the appearances of counsel and respondent's petition for enlargement of time for filing the certified record with the Court below.

IT IS FURTHER STIPULATED AND AGREED that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to file with the Clerk of the Supreme Court the entire transcript of record certified and filed by the Board in said Circuit Court of Appeals and that, in the event that the petition for writ of certiorari be granted, the printed record shall consist of the proceedings in the court below, and such portions of

the entire transcript of record as certified by the Board to the Court below as the respective parties may designate.

GILLIOM & GILLIOM,
By Arthur L. Gilliom,
Attorneys for Petitioner,
Indianapolis Power & Light Co.

Dated at Indianapolis, Ind., this —— day of October, 1941.

Dated at Washington, D. C., this 3rd day of November, 1941.

Charles Fahy,
Acting Solicitor General of the United States.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ———

INDIANAPOLIS POWER & LIGHT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO The Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Indianapolis Power & Light Company, respectfully shows:

I

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The proceeding below is one for review by the United States Circuit Court of Appeals for the Seventh Circuit

of a final order of the National Labor Relations Board made against Indianapolis Power & Light Company, the petitioner herein. After the review proceeding was commenced the Board asked enforcement of the order in the same proceeding.

The Board's order was made in a consolidated proceeding covering two cases instituted by the Board against Indianapolis Power & Light Company, a public utility generating and distributing electricity and heat at Indianapolis, Indiana. At the time when the cases were instituted the company also owned and operated radio broadcast station WFBM at Indianapolis, but had sold the station before the cases were heard and had ceased owning or operating it before the Board's order was made.

One of the constituent cases related exclusively to the radio station and to the complaining union in that case, Associated Broadcast Technicians (now known as Associated Broadcast Technicians Unit of the International Brotherhood of Electrical Workers). The Circuit Court of Appeals set aside so much of the Board's order as related to said radio station and union and by which petitioner was ordered to cease and desist from discouraging membership in said union of broadcast technicians after it no longer had any employees eligible thereto and to compensate one technician for the period intervening between the time of his discharge by petitioner and the time when he procured permanent like employment elsewhere.

The other of the constituent cases was instituted on complaint of a C. I. O. union, known as Utility Workers Organizing Committee, Local 120, affiliated with the Congress for Industrial Organizations, and this case related to employees in petitioner's generating plants. The Circuit Court granted modified enforcement of parts

of the Board's order which related to this constituent case. These parts of the order require petitioner to offer to reinstate and make whole two condenser pit operators (Collier and Elbreg) who were included in a general lay off of about seventy employees, made necessary by economic conditions in the fore part of 1938, and also require petitioner to cease and desist from discouraging membership in Utility Workers Organizing Committee, Local 120, affiliated with the Congress for Industrial Organizations, from encouraging membership in or otherwise supporting or assisting I. P. & L. Employees Protective Association or any other labor organization of its employees, or in any other manner interfering with, restraining or coercing its employees in the exercise of the right of self-organization, etc.; also to post notice of compliance with said order.

The petition filed in the Circuit Court of Appeals challenged the adverse parts of the order and findings of the Board for want of supporting evidence. The record discloses that as a matter of law, said adverse parts of the order and findings are not supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions reached by the Board.

In respect to the Board's order requiring reinstatement of Collier and Elbreg, and which the court has ordered enforced, there is a complete want of evidence to support the Board's finding that these men were discriminatorily discharged. On the contrary, the record shows by direct and undisputed evidence that they were selected with about seventy other employees for lay off in the economic recession in the fore part of 1938 (App. B, pp. 517, 525)[1]

[1] The page references herein made to "App. A" and "App. B" refer to printed Appendices "A" and "B" to petitioner's brief in the Circuit Court of Appeals which by stipulation constitute a part of the record for the purposes of this petition. The appellate proceedings are printed in a volume designated "Vol. III" of the printed record.

on the basis outlined in the General Manager's written order, viz.: "In laying off plant employees, however, the generating system as a whole is to be the governing basis. That is, all plant employees should be considered on the basis of merit, efficiency and length of service with the company. Necessary transfers between plants should be made as far as possible to accomplish this policy." (App. B, pp. 12-14, 505); that in selecting these two men, as well as all the rest, the management gave no thought to the matter of whether any of them did or did not belong to any labor organization (App. B, pp. 509-510) and when these selections were made no one in petitioner's management knew that these two men were affiliated with the C. I. O. union (App. B, pp. 527-528); and that both of these two men admitted in cross-examination that they had never informed anyone in petitioner's management that they were so affiliated (App. B, pp. 233-234, 274).

In respect to the Board's order requiring petitioner to cease and desist from encouraging or assisting I. P. & L. Employees Protective Association and coercing membership therein, and which the court ordered enforced, there is no evidence whatever to support the Board's findings that the petitioner engaged in such practice, and the Trial Examiner expressly found there was no evidence to support that conclusion (App. A, p. 61). The record shows affirmatively that petitioner had nothing to do with said Association until it had been voluntarily formed by the employees and more than a majority belonged thereto and had demanded recognition (App. B, pp. 79-80, 122-123) and that the only thing that petitioner has had to do with said Association was to bargain collectively with it and enter into a contract with it (App. B, pp. 98, 81-93). There was no attempt in these proceedings to disestablish the Association and there is no order to that effect.

In respect to the Board's order requiring petitioner to cease and desist from discouraging membership in the C. I. O. union and from interfering with rights of employees guaranteed by the National Labor Relations Act, and which the court ordered enforced, there is not substantial evidence to support the Board's finding that petitioner engaged in such practice. On the contrary, the record affirmatively shows by direct evidence that when it came to petitioner's attention that plant employees were killing time while on duty talking about union matters they were called in meeting by the plant superintendent under the instructions of the President and General Manager and were told the authoritative attitude of petitioner as determined by its President, viz.: that each employee was free to join or not join any union but that neither company time nor property should be utilized for that purpose and that while on duty they should give their time efficiently to their work for the company (App. B, pp. 536-538, 540-541, 606). Not a single employee was shown ever to have been threatened or coerced with respect to affiliation with the C. I. O. union or with respect to any labor organization, and there is no evidence that a single employee desiring to join the C. I. O. union or any other labor organization ever refrained from so doing.

In respect to the Board's order requiring petitioner generally to cease and desist from interfering with rights of employees under the Act, and which the court ordered enforced, there is no evidence to support the Board's finding that petitioner engaged in such practice. For support of such finding, the Board seized on the circumstance that six unorganized condenser pit operators, a year before there was any organizational activity, desired to talk with their superior in a group concerning their

wages and that the superior discouraged discussion of that matter with them in a group but was willing to discuss the wage matter with them individually (App. B, pp. 217-220, 242-244, 271-272, 564-566).

There were two successive opinions delivered and filed in the case by the Circuit Court of Appeals. These opinions clearly disclose that the court erroneously deemed itself precluded by "recent rulings of the Supreme Court," particularly by the opinion and decision in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584 (reversing that court), from making the inquiry and determination of law whether there is in this case such relevant evidence as a reasonable mind might accept as adequate to support the parts of the Board's order as to which the court granted enforcement and to support the Board's findings underlying said parts of the order. These opinions also disclose that the Circuit Court of Appeals erroneously deemed itself bound by the Board's inferences and findings because of said "recent rulings of the Supreme Court" and the cases cited in said opinions, but not by reason of any belief of its own that said inferences and findings were as a matter of law supported by such relevant evidence as a reasonable mind might accept as adequate to support the same.

Notwithstanding the state of the evidence as hereinbefore indicated, the court's opinions disclose that the court, by reason of "recent rulings of the Supreme Court" and the cited cases referred to in said opinions, deemed itself "constrained" to treat the Board's findings concerning interference as conclusive and deemed itself "powerless to disturb the Board's findings with respect to Collier and Elbreg" and "not permitted to disturb the order based on the finding of the discriminatory discharges". It is apparent from these opinions that the

court did not inquire into and determine the law question of whether these findings of interference and discriminatory discharge and the parts of the order based thereon are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If such inquiry and determination of such law question were made, it would be found that such findings and said parts of the order based thereon are not supported by evidence within the meaning of Section 10 (f) of the National Labor Relations Act as interpreted by the applicable decisions of the Supreme Court.

Petitioner feels itself aggrieved because enforcement was granted without there being evidence to support such order and without there having been an actual judicial review by the Circuit Court of Appeals as contemplated by Sec. 10 (f) of the Act to determine whether the order to be enforced is supported by evidence.

II

STATEMENT OF BASIS FOR JURISDICTION OF SUPREME COURT

Jurisdiction is conferred on the Supreme Court to review on writ of certiorari the judgment and decree in question by Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; 28 U. S. C. A. 347.

The case was brought in the United States Circuit Court of Appeals for the Seventh Circuit by the petitioner herein, Indianapolis Power & Light Company of Indianapolis, Indiana, under the provisions of Sec. 10 (f) of the National Labor Relations Act (49 Stat. 453; 29 U. S. C. A. 160 (f)), for the review of a final order made against said petitioner

by the National Labor Relations Board on July 6, 1940. Thereafter and in the same proceeding, the Board asked enforcement of said order.

Said Circuit Court of Appeals, in the said proceeding, on May 14, 1941, filed its first opinion in the cause, and on September 15, 1941, the court filed its final opinion. On October 9, 1941, said court denied said petitioner's petition for rehearing. On October 29, 1941, said court entered its judgment and decree setting aside said order in part and granting modified enforcement as to the remainder thereof. The Board's motion for a resettlement of said decree was denied by said court on November 27, 1941.

Within 90 days from the date of denial of said petition for rehearing, this petition for a writ of certiorari was filed by said petitioner on January 8, 1942.

Said final opinion, omitting caption and title, is as follows:

"Before EVANS and SPARKS, Circuit Judges, and WOODWARD, District Judge.

SPARKS, Circuit Judge. Petitioner asks this court to review and set aside an order of the Labor Board, and the Board asks that we enforce it. The complaints upon which the order was based charged, among other things, the commission of the acts referred to in the order, the pertinent parts of which we set forth in the margin.[1] The complaint also

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1 "* * * the National Labor Relations Board hereby orders that the respondent, Indianapolis Power & Light Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Utility Workers Organizing Committee, * * * affiliated with Congress of Industrial Organizations, in Associated Broadcast Technicians Unit * * * affiliated with American Federation of Labor, or in any other labor organization of its employees, by discharging

charged surveillance, and the discriminatory discharge of three additional employees not included in the order of reinstatement. These charges, however, were dismissed by the Board on recommendation of the Trial Examiner after hearing.[2]

It was stipulated that petitioner is an Indiana public utility corporation, primarily engaged in the pro-

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or by laying off any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(b) Encouraging membership in or otherwise supporting or assisting Indianapolis Power & Light Employees' Protective Association, * * * or any other labor organization of its employees, by discrimination in regard to hire or tenure or employment or any term or condition of employment, by urging, persuading, warning, or coercing employees to join such labor organization and/or to resign from or refuse to join U. W. O. C., A. B. T., or any other labor organization of its employees; or by any other act or acts; and

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Russell Rennaker for any loss of pay * * * by payment * * * of the amount he normally would have earned as wages from January 15, 1938, until February 1, 1939, * * *;

(b) Offer to Sidney Collier and Thomas Elbreg, * * * immediate and full reinstatement to the positions which they formerly occupied * * * and make them, * * * whole for any loss of pay * * *;

(c) Post * * * notices to its employees, stating (1) that the respondent will not engage in the conduct which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of the Order, * * * (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this order; (3) that its employees are free to become or remain members of U. W. O. C.; * * * A. B. T.; or any other labor organization, and (4) that it will not discriminate against any employee because of membership in or activity in behalf of such labor organization; * * *"

[2] "AND IT IS FURTHER ORDERED that the complaint, as amended, in so far as it alleges that the respondent engaged in unfair labor practices in connection with Roy Payton, Harry Wilkins, and Dewey Logsdon, or in connection with surveillance of its employees and meetings of A. B. T. * * * or in connection with the formation of * * * I. P. and L. Employees Protective Association, be, and the same hereby is, dismissed."

duction and distribution of electricity and steam at Indianapolis; that, incidentally, it also conducts in that locality a local retail department for the sale of electrical appliances; that it formerly owned and operated a radio broadcast station, WFBM, at Indianapolis, but this had been sold and transferred to a separate corporation, with the approval of the Federal Communications Commission, as of August 1, 1939, which was prior to the date of completion of hearings on the complaint; that after this transfer petitioner no longer had any employees at that or any radio station.

Two complaints were filed against petitioner, one arising out of its relation to one of its employees in the radio station, and the other to five employees in the generating plants. They were consolidated for hearing and for purposes of this review.

Petitioner challenges the Board's jurisdiction to enter the order against it as to either complaint. With respect to the radio station it urges that it no longer owned or operated that business at the time of the order, and that the one employee it was alleged to have discriminatorily discharged was engaged in other equivalent employment when the order was entered. Hence, it argues that his discharge could not furnish the basis for a valid order for payment of wages lost thereby. With respect to the generating plants, it insists that jurisdiction was lacking because of the local nature of their operations, which it contends did not involve interstate commerce.

Under the issues joined by the complaint and answer it is obvious that the Board had jurisdiction to pass upon those issues, whether its determination of them was right or wrong. The questions here, however, deal with the correctness of the Board's order in the light of the facts, that is to say—did the alleged unfair labor practices actually threaten interstate or foreign commerce in a substantial manner, and was

there substantial evidence to support the Board's finding?

It is conceded that the employees at the generating plants are not themselves engaged in interstate or foreign commerce. In *Edison Co. v. Labor Board,* 305 U. S. 197, at p. 223, the Court said: "* * * where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' interstate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a *substantial manner* is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, * * *. The justification for the exercise of federal power should clearly appear. *Florida v. United States,* 282 U. S. 194, 211, 212. But the question in such a case would relate not to the *existence* of the federal power but to the propriety of its exercise on a given state of facts." (Our italics.)

The facts upon which the Board relied in support of its jurisdiction over petitioner's generating plants engaged in its operations as a public utility are similar in many respects to those described in the Edison Company case, *supra.* There the Court held that the provisions of the Labor Relations Act extended to public utilities engaged in supplying electricity, gas and steam wholly within the state (with the possible exception of that supplied for the operation of the Holland Tunnel), where a part of the service was to railroads, an airport, two telegraph companies, a telephone company and steamships engaged in interstate or foreign commerce, as well as to the various federal buildings in the city. Under the ruling of that case, we feel impelled to hold that the Board had jurisdiction over petitioner's generating plants. We shall discuss later the question of the power of the Board to enter

the order with relation to petitioner as owner and operator of the radio station.

Petitioner next contends that even if the Board had jurisdiction to enter the order pertaining to employees other than those employed at station WFBM, there is no substantial evidence to support its findings that petitioner interfered with any rights guaranteed by Sec. 7 of the Act to its generating plant employees, or that it discouraged membership in the C. I. O. union and encouraged membership in the I. P. and L. Employees Protective Association (to which we shall refer as the Association), or that it discharged Elbreg and Collier because of their activity in support of the C. I. O. union.

While the evidence was by no means undisputed, we can not say under the recent rulings of the Supreme Court, that there was none of sufficient substance to support the following facts as found by the Board. In February, 1937, before any union was organized or attempted to be organized, the six condenser pit operators employed at one of the plants had decided to make a collective request relating to working conditions through the chief engineer at that plant. Before they did so, the engineer, Goodrich, learned of their decision and talked to them individually, telling them they were absolutely wrong to try to approach petitioner collectively, and that while it would confer with individual operators about working conditions, it would not meet with them as a group. Thereafter, the C. I. O. undertook to organize workers at the generating plants, and after an organizational meeting, a local was formed, and Collier and Elbreg were elected president and secretary in August, 1937. There is evidence, though disputed, that the management sought by inquiry and admonition to discourage enrollment in that union. Under the many rulings of the Supreme Court relating to the conclusiveness of the Board's findings, we are constrained to

hold that there was evidence in support of the finding that petitioner interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Sec. 7 of the Act.

In December, 1937, petitioner's general manager sent two communications, the first addressed to department heads, and the second to Goodrich, superintendent of plants, calling for a general reduction in operating expenses, necessitated by failing business and the poor outlook for the future. He called for a reduction in personnel by not replacing employees who left, and by laying off employees wherever possible, stating that in such lay offs, the generating system as a whole was to be considered, and employees were to be considered on the basis of merits, efficiency, and length of service with the company. In response to this requirement of reduction in the personnel, about seventy employees were discharged between January 4 and March 30, 1938, including Collier and Elbreg, who were discharged on January 5, 1938. Of this number only five were members of C. I. O., and the complaint as to the other three was dismissed on motion of respondent.

The Board found that Collier and Elbreg were discharged because of their activities in the union, which by that time had ceased to function. Petitioner introduced what would seem to us convincing evidence to the contrary, were we triers of the facts. However, in view of the fact that the Board is permitted to draw its own inferences from all the facts, and (under the ruling in *Labor Board v. Link-Belt Co.*, 311 U. S. 584) may rely upon such inferences in the absence of direct evidence in support of its findings, in opposition to direct evidence to the contrary, we are not permitted to disturb the order based on the finding of the discriminatory discharges.

The pertinent statute provided that "the findings of the Board as to the facts, if supported by evidence,

shall be conclusive." The Supreme Court has held that the word "evidence" as here used means "substantial evidence," and "* * * is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Co. v. Labor Board,* 305 U. S. 197, at p. 229. The statute further provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling." Section 10(b). The last cited case has this to say on that subject: "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. (Citing cases.) But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

In addition to these provisions, another section of the same law provides that the aggrieved party may have a review of the Board's order in this court. We have always presumed that this provision authorized us to correct what we in good faith thought was error of law in the Board's findings and order, including the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. See *Southern Pacific Co. v. Pool,* 160 U. S. 438, 440; *Edison Co. v. Labor Board, supra,* 229, 230.

In *National Labor Relations Board v. Waterman S. S. Co.,* 309 U. S. 206, the Court said: "* * * Congress has left questions of law which arise before the Board— but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line

with the general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act." This language was quoted in *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584.

In that case, the Court further said: " 'Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure.' Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of independent, even though they did not have the power to hire or to fire. * * * If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere." Under these decisions we are powerless to disturb the Board's findings with respect to Collier and Elbreg.

The order as to station WFBM falls into two categories. Petitioner was directed to cease discouraging membership in the A. B. T. union, and it was also ordered to compensate Rennaker for the time lost between his alleged discriminatory discharge, January 15, 1938, and February 1, 1939, when he obtained equivalent employment elsewhere. Petitioner contends that the order was void in both respects.

As grounds for the asserted invalidity relating to the A. B. T. union, petitioner contends that inasmuch as it had sold the radio station prior to the hearing in this proceeding, it then had no employees eligible to membership in that union, and an order relating to it could in no way effectuate the purposes of the Act,

and dealt with matters that were wholly moot. There is no question but that the transfer entirely divested petitioner of all interest in the station, and that it retained no control whatsoever over it; and that a new corporation, WFBM, Inc., had been organized for the purpose of taking over the station prior to the issuance of the complaint against petitioner, articles of incorporation having been approved and filed as of May 23, 1939. The sale had been approved by the Federal Communications Commission July 18, and formal transfer was made as of August 1, 1939.

Section 10(c) of the Act provides that if upon all the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any unfair labor practice (as defined in Sec. 8), then it shall state its findings of fact and shall issue and cause to be served on such person an order requiring him to cease and desist from such unfair labor practice and to take such affirmative action as will effectuate the policies of the statute. It was held in the case, *Labor Board v. Greyhound Lines,* 303 U. S. 261, that an order, lawful when made, did not become moot because it was *obeyed* or because changing circumstances indicated that the need for it might be *less* than when made. Under that ruling we are not permitted to say that the negative order did not effectuate the purpose of the Act, provided there was evidence of discouragement of Rennaker with respect to his membership in A. B. T.

There is no evidence in this record that either the employer or any of its officers or managers had knowledge that Rennaker, prior to, or at the time of, his discharge, belonged to A. B. T., or that he ever contemplated joining. They denied having such knowledge. The undisputed facts are that he did not join until a short time before he was discharged, because he was not eligible. At that time no one in petitioner's employ was eligible to membership, and Rennaker

never became eligible until A. B. T. changed its rules in that respect. No one in petitioner's employ, except Rennaker, was ever eligible to membership in A. B. T., and he said that he never informed petitioner or any of its officers that he had joined, or was contemplating a membership in A. B. T. He said that he merely signed the application and mailed it, and he did not say that he had informed any one of that fact. Before he was eligible, however, he did ask chief engineer Williams what he thought of A. B. T. Williams replied that he thought that would be the union for him to join. After I. P. L. was formed, Rennaker joined it, and a contract between it and respondent, covering all employees, was entered into on September 3, 1937. In November, 1937, he was notified that he was eligible to membership in A. B. T. Thereupon, he again asked Williams for advice as to what he should do. Williams replied: "No, I would answer the letter, Russ, and I would say that the boys now have an association of I. P. & L. employees and that you are no longer interested in A. B. T. That your present representatives, the employees' association, is serving the purpose admirably and there is no need for any outside connection at this time." Rennaker said: "I thanked him."

In view of the plenitude of the Board's power as set forth in the *Link-Belt* case, *supra*, we are not permitted to say that chief engineer Williams was not a supervisory employee, or that the Board lacked power to give weight to his activities and words, though he had no power to hire or to fire. The rule enunciated in that case, as applied here, is, if the words and deeds of Williams, taken in their setting, were reasonably likely to have restrained Rennaker's choice, and if Indianapolis Power and Light Company may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere, and an order to desist would be proper. The Board, having concluded that there was interference, issued such order, and it is now conceded that this

court is empowered to pass upon the question whether the Board's findings and conclusion in this respect are supported by such relevant evidence as a reasonable mind might accept as adequate to support such findings and conclusion. We think they are not.

It is proper under this rule to consider the setting of the two conversations between Rennaker and Williams, to which we have referred. They were friends, and prior to the times involved Rennaker had sought advice concerning his private affairs from Williams, and had received it. At the time of the first conversation neither Rennaker nor any of petitioner's employees were eligible to membership in A. B. T., but neither party to the conversation was aware of that fact, and Williams advised him to join it. Subsequently, A. B. T. notified Rennaker that it had revised its rules in such manner as to grant him membership, and sent him an application. Thereupon, he again sought Williams' advice with the result hereinbefore detailed. Under these circumstances we think it cannot be fairly said that Williams' words of advice were reasonably likely to have restrained Rennaker's choice. Within a very short time thereafter he became a member of A. B. T., which would indicate beyond doubt that he did not feel restrained by what Williams had said to him. Moreover, we think it cannot be fairly said that the petitioner was responsible, under the circumstances related, for the words or acts of Williams in this respect. For these reasons we think the Board was in error in finding and concluding that petitioner was guilty of interference with respect to its employee or employees joining A. B. T.

Furthermore, there is no evidence in this record that petitioner or any of its officers had knowledge of Rennaker's membership in A. B. T. at the time of, or before, his release as an employee. It knew, however, that he was not satisfied with his position, and had expressed a desire, and an intention, to leave when a

favorable opportunity presented itself to him. Moreover, petitioner's business was in such condition that it deemed it imperative to retrench its expenditures by discharging a number of its employees. We are warranted in taking judicial knowledge that almost every corporation and employer in the United States did precisely that thing, during the years here involved, and it certainly was not an unreasonable or unfair thing to do. Rennaker was informed of these facts by petitioner, and he never at any time, so far as petitioner knew, claimed that he was discharged because of his membership in A. B. T., or because of his union activities. Under these circumstances we think the Board's order with respect to Rennaker is "without a basis in evidence having rational probative force," (*Edison v. Labor Board, supra*), and that neither the findings nor the order of the Board, with respect to Rennaker's discharge, is supported by such evidence as a reasonable mind might accept as adequate for that purpose.

Petitioner further contends that the order to make Rennaker whole is void because at the time it was made he was no longer an employee. Its theory is that the Board's power to order back pay to employees discriminatorily discharged is limited to those cases where employees are lawfully ordered reinstated, and since Rennaker was otherwise employed when the order was made he cannot be considered at that time as an employee of petitioner. The question of the power of the Board to award back pay independently of reinstatement was raised in the case of *Phelps Dodge Corp. v. Labor Board,* decided April 28, 1941, by the Supreme Court. Although the Court did not pass upon the question expressly, the order appears to be within the power of the Board as defined by that decision, and no doubt was intended to be included among the "other minor objections to the Board's order," which the Court deemed it unnecessary to

discuss, agreeing with the disposition of them by the court below.

The Board requested and consented to a modification of that part of its order which provided for payment by petitioner to public work-relief agencies of sums earned by discharged employees on work-relief projects. Petitioner's application to set aside the order of the Board is granted with respect to Rennaker and WFBM, also, as to payments to work-relief agencies. It is overruled with respect to Collier and Elbreg and the generating plants. The Board's petition for an enforcement order is granted, subject to the modifications herein suggested."

Said first opinion, omitting caption and title, is as follows:

"Before EVANS and SPARKS, Circuit Judges, and WOODWARD, District Judge.

SPARKS, Circuit Judge. Petitioner asks this court to review and set aside an order of the Labor Board, and the Board asks that we enforce it. The complaints upon which the order was based charged, among other things, the commission of the acts referred to in the order, the pertinent parts of which we set forth in the margin.[1] The complaint also charged surveillance,

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[1] "* * * the National Labor Relations Board hereby orders that the respondent, Indianapolis Power & Light Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Utility Workers Organizing Committee, * * * affiliated with Congress of Industrial Organizations, in Associated Broadcast Technicians Unit * * * affiliated with American Federation of Labor, or in any other labor organization of its employees, by discharging or by laying off any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(b) Encouraging membership in or otherwise supporting or assisting Indianapolis Power & Light Employees' Protective Association, * * * or any other labor organization of its employees, by discrimination in regard to hire or tenure or employment or any term or condition of employment, by urging, persuading,

and the discrimatory discharge of three additional employees not included in the order of reinstatement. These charges, however, were dismissed by the Board on recommendation of the Trial Examiner after hearing.[2]

It was stipulated that petitioner is an Indiana public utility corporation, primarily engaged in the production and distribution of electricity and steam at Indianapolis; that, incidentally, it also conducts in that locality a local retail department for the sale of electrical appliances; that it formerly owned and operated a radio broadcast station, WFBM, at Indian-

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warning, or coercing employees to join such labor organization and/or to resign from or refuse to join U. W. O. C.; A. B. T., or any other labor organization of its employees; or by any other act or acts; and

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Russell Rennaker for any loss of pay * * * by payment * * * of the amount he normally would have earned as wages from January 15, 1938, until February 1, 1939, * * *;

(b) Offer to Sidney Collier and Thomas Elbreg, * * * immediate and full reinstatement to the positions which they formerly occupied * * * and make them, * * * whole for any loss of pay * * *;

(c) Post * * * notices to its employees, stating (1) that the respondent will not engage in the conduct which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of the Order, * * * (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order, (3) that its employees are free to become or remain members of U. W. O. C.; * * * A. B. T.; or any other labor organization, and (4) that it will not discriminate against any employee because of membership in or activity in behalf of such labor organization; * * *;

[2] "AND IT IS FURTHER ORDERED that the complaint, as amended, in so far as it alleges that the respondent engaged in unfair labor practices in connection with Roy Payton, Harry Wilkins, and Dewey Logsdon, or in connection with surveillance of its employees and meetings of A. B. T. * * * or in connection with the formation of * * * I. P. and L. Employees Protective Association, be, and the same hereby is, dismissed."

apolis, but this had been sold and transferred to a separate corporation, with the approval of the Federal Communications Commission, as of August 1, 1939, which was prior to the date of completion of hearings on the complaint; that after this transfer petitioner no longer had any employees at that or any radio station.

Two complaints were filed against petitioner, one arising out of its relation to one of its employees in the radio station, and the other to five employees in the generating plants. They were consolidated for hearing and for purposes of this review.

Petitioner challenges the Board's jurisdiction to enter the order against it as to either complaint. With respect to the radio station it urges that it no longer owned or operated that business at the time of the order, and that the one employee it was alleged to have discriminatorily discharged was engaged in other equivalent employment when the order was entered. Hence, it argues that his discharge could not furnish the basis for a valid order for payment of wages lost thereby. With respect to the generating plants, it insists that jurisdiction was lacking because of the local nature of their operations, which it contends did not involve interstate commerce.

Under the issues joined by the complaint and answer it is obvious that the Board had jurisdiction to pass upon those issues, whether its determination of them was right or wrong. The questions here, however, deal with the correctness of the Board's order in the light of the facts, that is to say—did the alleged unfair labor practices actually threaten interstate or foreign commerce in a substantial manner, and was there substantial evidence to support the Board's findings?

It is conceded that the employees at the generating plants are not themselves engaged in interstate or

foreign commerce. In *Edison Co. v. Labor Board,* 305 U. S. 197, at p. 223, the Court said: "* * * where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employer's interstate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a *substantial manner* is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, * * *. The justification for the exercise of federal power should clearly appear. *Florida v. United States,* 282 U. S. 194, 211, 212. But the question in such a case would relate not to the *existence* of the federal power but to the propriety of its exercise on a given state of facts." (Our italics.)

The facts upon which the Board relied in support of its jurisdiction over petitioner's generating plants engaged in its operations as a public utility are similar in many respects to those described in the Edison Company case, *supra.* There the Court held that the provisions of the Labor Relations Act extended to public utilities engaged in supplying electricity, gas and steam wholly within the state (with the possible exception of that supplied for the operation of the Holland Tunnel), where a part of the service was to railroads, an airport, two telegraph companies, a telephone company and steamships engaged in interstate or foreign commerce, as well as to the various federal buildings in the city. Under the ruling of that case, we feel impelled to hold that the Board had jurisdiction over petitioner's generating plants. We shall discuss later the question of the power of the Board to enter the order with relation to petitioner as owner and operator of the radio station.

Petitioner next contends that even if the Board had jurisdiction to enter the order pertaining to employees other than those employed at station WFBM, there is no substantial evidence to support its findings that petitioner interfered with any rights guaranteed by § 7 of the Act to its generating plant employees, or that it discouraged membership in the C. I. O. union and encouraged membership in the I. P. and L. Employees Protective Association (to which we shall refer as the Association), or that it discharged Elbreg and Collier because of their activity in support of the C. I. O. union.

While the evidence was by no means undisputed, we can not say under the recent rulings of the Supreme Court, that there was none of sufficient substance to support the following facts as found by the Board. In February, 1937, before any union was organized or attempted to be organized, the six condenser pit operators employed at one of the plants had decided to make a collective request relating to working conditions through the chief engineer at that plant. Before they did so, the engineer, Goodrich, learned of their decision and talked to them individually, telling them they were absolutely wrong to try to approach petitioner collectively, and that while it would confer with individual operators about working conditions, it would not meet with them as a group. Thereafter, the C. I. O. undertook to organize workers at the generating plants, and after an organizational meeting, a local was formed, and Collier and Elbreg were elected president and secretary in August, 1937. There is evidence, though disputed, that the management sought by inquiry and admonition to discourage enrollment in that union. Under the many rulings of the Supreme Court relating to the conclusiveness of the Board's findings, we are constrained to hold that there was evidence in support of the finding that petitioner interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by § 7 of the Act.

In December, 1937, petitioner's general manager sent two communications, the first addressed to department heads, and the second to Goodrich, superintendent of plants, calling for a general reduction in operating expenses, necessitated by failing business and the poor outlook for the future. He called for a reduction in personnel by not replacing employees who left, and by laying off employees wherever possible, stating that in such lay-offs, the generating system as a whole was to be considered, and employees were to be considered on the basis of merits, efficiency, and length of service with the company. In response to this requirement of reduction in the personnel, about seventy employees were discharged between January 4 and March 30, 1938, including Collier and Elbreg, who were discharged on January 5, 1938. Of this number only five were members of C. I. O., and the complaint as to the other three was dismissed on motion of respondent.

The Board found that Collier and Elbreg were discharged because of their activities in the union, which by that time had ceased to function. Petitioner introduced what would seem to us convincing evidence to the contrary, were we triers of the facts. However, in view of the fact that the Board is permitted to draw its own inferences from all the facts, and (under the ruling in *Labor Board v. Link-Belt Co.*, decided by the Supreme Court January 6, 1941), may rely upon such inferences in the absence of direct evidence in support of its findings, in opposition to direct evidence to the contrary, we are not permitted to disturb the order based on the finding of the discriminatory discharges.

The pertinent statute provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." The Supreme Court has held that the word "evidence" as here used means "substantial evidence," and "* * * is more than a mere scintilla. It means such relevant evidence as a rea-

sonable mind might accept as adequate to support a conclusion." *Edison Co. v. Labor Board,* 305 U. S. 197, at p. 229. The statute further provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling." Section 10(b). The last cited case has this to say on that subject: "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. (Citing cases.) But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force."

In addition to these provisions, another section of the same law provides that the aggrieved party may have a review of the Board's order in this court. We have always presumed that this provision authorized us to correct what we in good faith thought was error of law in the Board's findings and order, including the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.

Counsel for respondent, however, contend that this is to weigh evidence, which we are not permitted to do, notwithstanding the fact that the statute authorizes the review, and does not limit the purposes of that review, except to say that the finding of the Board, if supported by substantial evidence, shall be conclusive. The effect of respondent's contention is that, if there is any evidence, either direct or inferential, the Board is the sole judge as to whether its findings and order are supported by substantial evidence, that is to say, whether they are based on a mere scintilla of evidence, or on such relevant evidence as a reasonable mind might accept as adequate to support its conclusions. This contention seems to be supported

in *National Labor Relations Board v. Waterman S. S. Co.*, 309 U. S. 206. There the Court said: "* * * Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with the general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act." This language was quoted in *National Labor Relations Board v. Link-Belt Co.*, decided by the Supreme Court on January 6, 1941. Obviously we have heretofore erroneously proceeded on the theory that whether the findings were based on no more than a scintilla of evidence or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusions, were questions of law and not of fact. In so ruling we have followed the unanimous decision of *Southern Pacific Company v. Pool*, 160 U. S. 438, 440, in the light of *Edison Co. v. Labor Board, supra*, at pages 229, 230.

In the Link-Belt case, *supra*, the Court further said: "'Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure.' Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of Independent, even though they did not have the power to hire or to fire. * * * If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere." Under these decisions we are powerless to disturb the Board's findings.

The order as to station WFBM falls into two categories. Petitioner was directed to cease discouraging membership in the A. B. T. union, and it was also ordered to compensate Rennaker for the time lost between his alleged discriminatory discharge, January 15, 1938, and February 1, 1939, when he obtained equivalent employment elsewhere. Petitioner contends that the order was void in both respects.

As grounds for the asserted invalidity relating to the A. B. T. union, petitioner contends that inasmuch as it had sold the radio station prior to the hearing in this proceeding, it then had no employees eligible to membership in that union, and an order relating to it could in no way effectuate the purposes of the Act and dealt with matters that were wholly moot. There is no question but that the transfer entirely divested petitioner of all interest in the station, and that it retained no control whatsoever over it; and that a new corporation, WFBM, Inc., had been organized for the purpose of taking over the station prior to the issuance of the complaint against petitioner, articles of incorporation having been approved and filed as of May 23, 1939. The sale had been approved by the Federal Communications Commission July 18, and formal transfer was made as of August 1, 1939.

Section 10(c) of the Act, provides that if upon all the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any unfair labor practice (as defined in § 8), then it shall state its findings of fact and shall issue and cause to be served on such person an order requiring him to cease and desist from such unfair labor practice and to take such affirmative action as will effectuate the policies of the statute. It was held in the case, *Labor Board v. Greyhound Lines,* 303 U. S. 261, that an order, lawful when made, did not become moot because it was *obeyed* or because changing circumstances indicated that the need for it might be *less* than when made. Under that ruling

we are not permitted to say that the negative order did not effectuate the purpose of the Act, provided there was evidence of discouragement of Rennaker with respect to his membership in A. B. T.

We are not unmindful that there is no evidence in this record that either the employer or any of its officers or managers had knowledge that Rennaker, prior to, or at the time of, his discharge, belonged to A. B. T., or that he ever contemplated joining. They denied having such knowledge. The undisputed facts are that he did not join until a short time before he was discharged, because he was not eligible. At that time no one in petitioner's employ was eligible to membership, and Rennaker never became eligible until A. B. T. changed its rules in that respect. No one in petitioner's employ, except Rennaker, was ever eligible to membership in A. B. T., and he said that he never informed petitioner or any of its officers that he had joined, or was contemplating a membership in A. B. T. He said that he merely signed the application and mailed it, and he did not say that he had informed any one of that fact. Before he was eligible, however, he did ask chief engineer Williams what he thought of A. B. T. Williams replied that he thought that would be the union for him to join. After I. P. L. was formed, Rennaker joined it, and a contract between it and respondent, covering all employees, was entered into on September 3, 1937. In November, 1937, he was notified that he was eligible to membership in A. B. T. Thereupon, he again asked Williams for advice as to what he should do. Williams replied: "No, I would answer the letter Russ and I would say that the boys now have an association of I. P. & L. employees and that you are no longer interested in A. B. T. That your present representatives, the employees' association, is serving the purpose admirably and there is no need for any outside connection at this time." Rennaker said: "I thanked him."

In view of the plenitude of the Board's power as set forth in the *Link-Belt* case, *supra,* we are not permitted to say that chief engineer Williams was not a supervisory employee, or that his words, taken in their setting, were not reasonably likely to restrain Rennaker's choice, or that the employer may not fairly be said to have been responsible for them, or that they do not constitute a proper basis for the conclusion that the employer did interfere. These are said to be matters of fact peculiarly within the province of the Board to decide, and its decision is held to be final. We are not called upon to decide the relative weight or merit of an imponderable as distinguished from a scintilla. Whatever that may be, we learn from the *Link-Belt* case, *supra,* that it is the duty of the Board to appraise the imponderables, subtle or otherwise, and by that appraisement we are bound.

Petitioner contends that the order to make whole Russell Rennaker, a broadcast technician at the radio station, is also void because at the time it was made Rennaker was no longer an employee. Its theory is that the Board's power to order back pay to employees discriminatorily discharged is limited to those cases where employees are lawfully ordered reinstated, and since Rennaker was otherwise employed when the order was made he cannot be considered at that time as an employee of petitioner. The question of the power of the Board to award back pay independently of reinstatement was raised in the case of *Phelps Dodge Corp. v. Labor Board,* decided April 28, 1941, by the Supreme Court. Although the Court did not pass upon the question expressly, the order appears to be within the power of the Board as defined by that decision, and no doubt was intended to be included among the "other minor objections to the Board's order," which the Court deemed it unnecessary to discuss, agreeing with the disposition of them by the court below.

The Board requested and consented to a modification of that part of its order which provided for payment by petitioner to public work-relief agencies of sums earned by discharged employees on work-relief projects. Petitioner's application to set aside the order of the Board is denied, and the petition of the Board for enforcement of its order is granted, subject to the modification suggested herein."

III

THE QUESTIONS PRESENTED

There are presented the following law questions:

1. Did "recent rulings of the Supreme Court", particularly in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584 and *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206, curtail the lower court's power and as a matter of law render it "powerless to disturb" and require it to treat as conclusive the Board's several findings in this case relating to generating plant employees (as the lower court held they did), and did they preclude the lower court from making its own independent determination of the law question whether said findings are supported by evidence under the criterion established in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, that such findings must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"? (The findings referred to in the foregoing question are that petitioner discriminatorily discharged Sidney Collier and Thomas Elbreg because of affiliation with the C. I. O. local, that it discouraged membership in the C. I. O. local and interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and that it supported and encouraged membership in I. P. and L. Em-

ployees Protective Association; also the findings subsidiary thereto.)

2. Did the failure of the lower court to make its own independent determination of the question whether said findings are supported by evidence under the established criterion, and its failure to point out in its written opinions legally sufficient evidence to support the challenged findings, and its failure even to discuss said finding relating to the employees' Association, constitute such a departure from the accepted and usual course of judicial proceedings in this type of case, so as to call for the exercise of this court's power of supervision?

3. Are the Board's said findings, including the subsidiary findings, supported by substantial evidence under the test of the established criterion?

4. Where, as here, the employer furnishes direct and positive evidence showing a reasonable and lawful explanation for the inclusion in a general lay off, economically necessary, of individuals (Collier and Elbreg) claiming to have been discriminatorily discharged because of union affiliation but who admit they never informed management of such affiliation and management testified it had no such knowledge and gave no consideration to such matter, does the Board have a burden to overcome such explanation with evidence to the contrary?

And if in such state of the evidence the Board does not offer evidence to overcome such explanation but makes a finding of discriminatory discharge, is *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584 authority for such finding on the theory that the Board may upon the whole record draw, and rely upon, an inference of discriminatory discharge (as was held by the lower court), notwithstanding

the direct evidence in opposition to such inference seems "convincing" to the reviewing court?

5. Did the unwillingness of a plant engineer to meet with a group of six unorganized condenser pit operators to discuss wage grievances affecting only them at a time prior to any self-organization of employees constitute interference, restraint and coercion of the employees in the exercise of rights guaranteed by Section 7 of the Act "Under the many rulings of the Supreme Court relating to the conclusiveness of the Board's findings", as the lower court held it did?

IV

THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioner respectfully says that the writ should be allowed for each of the reasons following:

1. The written opinions delivered below disclose that the important Federal question of what power the lower court has as a reviewing court in this and like cases to determine whether challenged findings of the National Labor Relations Board are supported by evidence, was erroneously decided in a way that conflicts with applicable decisions of this court, including the very cases cited (*N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584; *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206) and regarded by the lower court as curtailing its power and rendering it "powerless to disturb" the Board's findings relating to generating plant employees.

In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, this court established, and ever since has itself used, the criterion by which to determine the law question

whether a challenged finding of the Board is supported by evidence within the meaning of Section 10 (e) and (f) of the Act; that criterion being that such findings must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In both of its opinions the lower court said that it had "always presumed" it was authorized to correct what it "in good faith thought was error of law in the Board's findings and order," including "the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion"; and in its final opinion the court held that under recent rulings of the Supreme Court it was "constrained to hold" that there was "evidence in support" of the finding that petitioner "interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act," and, "Under these decisions we are powerless to disturb the Board's findings with respect to Collier and Elbreg"; also that in view of the *Link-Belt Company* case "* * * we are not permitted to disturb the order based on the finding of the discriminatory discharges", though the evidence to the contrary appears "convincing". The decisions of this court have not curtailed the power or duty of the lower court to determine on the basis of the established criterion whether findings of the Board are supported by evidence.

It is thus apparent that the lower court did not make its own independent determination of the law question whether said findings are supported by evidence judged on the basis of the established criterion, due to a misconstruction of the decisions of the Supreme Court in the *Link-Belt Company* case and in other cases, and therefore petitioner has not received the kind of review of the

order based on said challenged findings that Section 10 (f) of the Act, as interpreted by the decisions of the Supreme Court, contemplates.

2. The opinions in the case disclose that the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings in this type case as to call for the exercise of this court's power of supervision. Such accepted and usual course is for the court to determine upon a careful examination of the record whether the challenged order and findings of the Board are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and then to set forth in the court's opinion, for public guidance, a sufficient review or exposition of the evidence to explain the court's decision. Such determination was not made in this case in respect to the parts of the order as to which enforcement was granted and the opinion does not set forth a review or exposition of evidence to explain the court's action. Rather, the court's action is by its opinions placed in the light of being compelled by something the Supreme Court has said regardless of what the Circuit Court of Appeals thinks of the evidence. If the accepted and usual course were followed in this case, a different result, favorable to petitioner, would follow.

3. Judged on the basis of said established criterion, the Board's findings viz.; that the two condenser pit operators (Collier and Elbreg) were discriminatorily discharged, that petitioner discouraged membership in the C. I. O. local and interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and that petitioner supported and encouraged membership in I. P. and L. Employees Protective Association, also the findings subsidiary thereto, are not sup-

ported by evidence and are clearly improper; and the Board is not entitled to enforcement of its order based on said unsupported findings.

4. The decision of the Circuit Court of Appeals that the Board's inference that Collier and Elbreg were discriminatorily discharged is necessarily binding on the reviewing court despite "convincing" direct evidence to the contrary and despite positive evidence establishing a reasonable and lawful explanation for their lay off, is in conflict with decisions on the same matters by other circuit courts of appeal, viz.; with the decisions in *Nevada Consolidated Copper Corp. v. N. L. R. B.* (C. C. A. 10, Aug. 27, 1941), 122 F. (2d) (Adv. Ed.) 587, and in *N. L. R. B. v. Tex-O-Kan Flour Mills Co.* (C. C. A. 5, Aug. 5, 1941), 122 F. (2d) (Adv. Ed.) 433 that fact inferences drawn by the Board must, in order to stand, have reasonable support in the evidence, also that where a reasonable explanation for the employer's action is shown by evidence the Board has the burden of establishing the falsity of the explanation.

5. The decision below that the unwillingness of the plant engineer at the Harding Street plant, in February, 1937, before there were any organizational activities, to discuss with an unorganized group of six condenser pit operators wage grievances affecting only them violated their rights under Section 7 of the Act "under the many rulings of the Supreme Court" is erroneous. Neither this, nor any court, seems to have held that the Act affords such an unorganized group the right to a group discussion of wages affecting only the individuals composing the group. The unwillingness of the plant engineer to discuss wages with said group did not constitute an unfair labor practice under the Act.

WHEREFORE, the petitioner, Indianapolis Power & Light Company prays that a writ of certiorari be issued under the seal of the Supreme Court directed to the Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals had in the case numbered and entitled on the docket as No. 7448, Indianapolis Power & Light Company, Petitioner, vs. National Labor Relations Board, Respondent, to the end that this cause may be reviewed and determined by the Supreme Court, and that the judgment and decree therein of said Circuit Court of Appeals be reversed by the Supreme Court, and that said order of the National Labor Relation's Board be by this court ordered set aside in its entirety, and for such further relief as to the Supreme Court may seem proper.

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KARL J. STIPHER,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ———

INDIANAPOLIS POWER & LIGHT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI

I

OPINIONS OF COURT BELOW

Both the final opinion of the United States Circuit Court of Appeals and its first opinion filed in the case are set out in full in the foregoing petition, they also appear in the record (R., Vol. III) at pp. 58 to 68, and 26 to 35 respectively; and the final opinion is reported in 122 Fed. (2d) (Adv. Ed.) 757.

II

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The basis for this Court's jurisdiction to review on writ of certiorari the judgment and decree below is set

forth in the jurisdictional statement appearing at pages 7 to 31 of the foregoing petition for certiorari, which statement is here incorporated by reference.

The reasons upon which the exercise of this Court's jurisdiction in the premises is asked are concisely set forth in the statement of the reasons relied on for allowance of the writ of certiorari appearing at pages 33 to 36 of the foregoing petition, which statement of reasons is here incorporated by reference.

III

CONCISE STATEMENT OF THE CASE

This case is one for judicial review under the provisions of Section 10 (f) of the National Labor Relations Act of a final order made upon findings of fact, under the provisions of Section 10 (c) of the Act, by the National Labor Relations Board. Petitioner, an electric utility doing business at Indianapolis, Indiana, filed its petition for review of the order in the United States Circuit Court of Appeals for the Seventh Circuit. One of the grounds in the petition for review is that the Board's findings of fact upon which the adverse parts of the order were based are not supported by evidence (R., Vol. III, pages 13, 23). The Board appeared and asked enforcement of the order.

The Board's order was made upon a complaint issued in a consolidated proceeding covering two cases before the Board. One of the constituent cases related to charges of unfair labor practices filed by a union known as Associated Broadcast Technicians, in respect to employees at a radio station (WFBM), formerly owned and operated by the petitioner. It was stipulated at the hearing before the Trial Examiner that petitioner had sold the radio station

and would not have any employees there after August 8, 1939 (App. B., pp. 402-404), which was nearly a year before the order of the Board was made on July 6, 1940 (App. A, p. 149). The Board found that, as charged in the complaint, petitioner had discouraged membership in said technicians union, and that Russell Rennaker (a radio technician) had been discharged because he assisted that union. The Board's order required cessation of discouragement of membership in that union, and required compensation to Rennaker from the time of discharge to the time when he had taken permanent employment elsewhere.

The other constituent case related to charges of unfair labor practices filed by a C. I. O. union, known as Utility Workers Organizing Committee, Local 120, Affiliated with the Congress for Industrial Organizations (by the Board sometimes referred to as the U. W. O. C.), in respect to generating plant employees. The Board found that, as charged in the complaint, two condenser pit operators (Sidney Collier and Thomas Elbreg) employed at the Harding Streeet generating plant were discharged in January, 1938 "because they assisted the U. W. O. C. and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection" (App. A, p. 141), also that petitioner discouraged membership in U. W. O. C. and interfered with the exercise of rights guaranteed employees in Section 7 of the Act, and that petitioner supported and encouraged membership in a labor organization known as I. P. and L. Employees Protective Association (herein sometimes referred to as "I. P. and L."). Upon those findings the Board ordered reinstatement, with back pay, of Collier and Elbreg and ordered cessation of discouragement of membership in U. W. O. C. and of interference with the exer-

cise of rights guaranteed in Section 7 of the Act, and of support and encouragement of membership in I. P. and L.; also posting of notice of compliance with said order.

There was a partial dismissal of the complaint by the Board (App. A, p. 149) in so far as it alleged unfair labor practices in connection with three other generating plant employees (Payton, Wilkins and Logsdon, who belonged to the C. I. O. union), or in connection with the formation of I. P. and L.

On May 14, 1941, the Court below filed its first opinion in the case wherein it granted enforcement of the order in its entirety. In that opinion the Court referred to "recent rulings of the Supreme Court", particularly to *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584 (reversing this lower court), and said: "Under these decisions we are powerless to disturb the Board's findings." (R., Vol. III, p. 32.) At one place in the opinion (R., Vol. III, pp. 31-32) there was attributed to the Board's counsel a contention derogatory of judicial power to disturb the Board's findings, which counsel disowned in a motion by the Board to modify the language of the opinion (R., Vol. III, pp. 36-38). Petitioner filed a response to said motion and also its first petition for rehearing (R., Vol. III, pp. 39-56). Thereafter, on September 15, 1941, on consideration of said motion and response and without acting on the petition for rehearing, the court set aside the opinion and order (R., Vol. III, p. 57), and filed a superseding opinion (R., Vol. III, pp. 57-68), which is the final opinion in the case. Again, this petitioner petitioned for a rehearing (R., Vol. III, pp. 69-76), but this was denied (R., Vol. III, p. 78).

In this final opinion the Court ordered set aside so much of the Board's order as related to the radio station and which required cessation of discouragement of mem-

bership in the radio technicians union and which required compensation to Rennaker (R., Vol. III, p. 68).

But the Court granted modified enforcement of that part of the order relating to generating plant employees and by which Collier and Elbreg are ordered reinstated with back pay, and by which petitioner is ordered to cease discouraging membership in U. W. O. C., to cease interfering with the exercise of rights guaranteed in Section 7 of the Act, and to cease supporting and encouraging membership in I. P. and L.; also to post notice of compliance with said order. A decree (R., Vol. III, pp. 81-83) for such modified enforcement was entered on October 29, 1941, after submission by the Board of a proposed decree and the filing of objections thereto by this petitioner. The modifications made by the decree are: The words "successors and assigns" were eliminated; the cease and desist provisions in paragraphs 1 (a) (b) and (c) of the order were in corresponding paragraphs of the decree limited to the things forbidden by the order insofar as they may be "in violation of the National Labor Relations Act", and there was eliminated from paragraph 1 (a) concerning discouragement of membership in U. W. O. C., the phrase "or any other labor organization of its employees"; the reinstatement provision in paragraph 2 (b) of the order was modified in paragraph 2 (a) of the decree by substitution of the phrase "without prejudice to such seniority rights as these men might be entitled to had they continued to work", for the phrase in the order "without prejudice to their seniority and other rights and privileges"; the requirement in paragraph 2 (c) of the order for posting notice of compliance in all plants and offices was in paragraph 2 (b) of the decree limited so as to require posting of notice at the Harding Street plant and offices. The Board's motion for

a resettlement of said decree was denied by the court on November 27, 1941.

This final opinion of the lower court discloses that enforcement was granted, not as a result of any independent inquiry into and determination by the Court of the law question whether the Board's findings are supported by evidence, but as a result of the court's feeling of constraint and lack of power due to "recent rulings of the Supreme Court" which are still referred to and misconstrued in the last opinion.

The findings of fact which form the basis of the order granted enforcement by the lower court are found in the "Decision and Order" rendered by the Board on July 6, 1940 (App. A, pp. 110-149). In the latter under the heading "B. *Interference, restraint, and coercion in connection with the generating plant employees and the discriminatory discharges of Collier and Elbreg*" (App. A, p. 134), the Board considers the questions indicated in that heading together and predicates its finding of discriminatory discharge of Collier and Elbreg on what it considers evidence of interference, restraint and coercion respecting membership in the C. I. O. union and rights guaranteed in Section 7 of the Act and in turn the discriminatory discharges so found are treated by the Board as constituting interference, restraint and coercion (App. A, p. 141). There is not evidence to support those findings either under such admixture of considerations or under any consideration of the question involved singly, as will hereinafter appear.

Under the heading "C. *Support of and Encouragement of Membership in the Association*" (App. A, p. 141) the Board found that petitioner supported and encouraged membership in I. P. and L. There is no evidence to support this finding, as will hereinafter appear, and the Trial

Examiner had expressly found that "The evidence does not support the conclusion, however, that the respondent itself encouraged the formation of the Association or coerced its employees into joining it, as alleged in the complaint." (App. A, p. 61).

The truth, shown by undisputed and affirmative evidence, is precisely opposite to all of said findings of the Board, as will hereinafter appear in respect to each of said matters separately considered.

(The evidence concerning the lay off of Collier and Elbreg.) These two condenser pit operators were 2 of 69 so-called generating plant employees who were laid off during the fore part of 1938 pursuant to orders of General Manager Ralston (App. B, pp. 523-525; Exhibit 6, App. B, pp. 20-22, introduced, pp. 524-525, App. B). The General Manager's orders to reduce the pay roll were given in writing to the department heads and they constituted the company's exhibits 2, 3, 4 and 5. The first of these, dated May 12, 1937 (Exhibit 5, App. B, p. 19, introduced, p. 507) required department heads to study the matter of retrenchment in new construction and in employment of men. The second order, dated October 12, 1937 (Exhibit 4, App. B, pp. 17-18, introduced, p. 506) quoted a letter from the company's president in which appears the following statement:

> "The present economic situation is most disturbing and it behooves us to restrict our construction activities considerably in view of the apparent danger of a serious upset to industrial production."

In said second order the General Manager stated in capital letters that the policy of retrenchment "SHOULD SOON RESULT IN A REDUCTION OF OUR PAYROLL IN SOME DEPARTMENTS. AS FAST AS THIS IS

POSSIBLE START REDUCING FORCES." (App. B, p. 18.) The third of said orders, dated December 14, 1937 (Exhibit 2, App. B, pp. 12-14, introduced, p. 505) called attention to the pessimistic outlook of business and ordered immediate reduction in employee personnel in view of "decreasing load and revenues and the large increase in coal cost." In that order, the General Manager outlined the basis upon which plant employees should be selected for lay off as follows:

> "In laying off plant employees, however, the generating system as a whole is to be the governing basis. That is, all plant employees should be considered on the basis of merit, efficiency and length of service with the company. Necessary transfers between plants should be made as far as possible to accomplish this policy."

(App. B, p. 14.) The last of the General Manager's orders, dated December 31, 1937 (Exhibit 3, App. B, pp. 15-17, introduced, p. 505) was addressed to R. H. Goodrich (superintendent of plants, App. B, p. 488) and referred to the order of December 14 sent to the department heads, also to a letter from the company president read at a meeting of department heads on December 16, and which letter called attention to the "severe business recession" then current and to the necessity of reducing operating expenses "in every possible way" and asked for a determination "within the next two weeks" of possible economies and for written reports from department heads thereon to the General Manager (App. B, pp. 15-16). In said last order of the General Manager, he stated "Our economy program should include not only possible reduction of pay rolls, but all other practical steps leading to less operating costs and to an adoption of a deferred construction schedule" and in capital letters required of Goodrich that he "GIVE THIS

MATTER YOUR MOST CAREFUL THOUGHT AS RESULTS MUST BE OBTAINED." (App. B, p. 17.) New plant improvements also required some personnel reduction (App. B, pp. 490-502). The "load" (demand for current) in early 1938 was 10 to 12% below that of the same period in 1937 (App. B, p. 526).

Pursuant to the foregoing written orders of the General Manager and upon the foregoing basis outlined for selecting men for lay off, the 69 generating plant employees listed in the company's Exhibit 6 were selected for lay off and were laid off (App. B, p. 509). Said Exhibit 6 (App. B, pp. 20-22, introduced at pp. 524-525, App. B.), discloses that on January 4 two were laid off, that on January 5 nine were laid off (in which group were included Collier and Elbreg), that on January 6 twelve were laid off, and that a total of twenty-five were laid off in the month of January, 1938. Exhibit 6 further discloses that most of the remainder of this 69 laid off were laid off in the month of May, 1938. It was revealed at the hearing before the Trial Examiner that of the 69 thus laid off, 54 were members of I. P. and L. (App. B, p. 615), and that only 5 of them were affiliated with the C. I. O. union. The evidence is that the first time anyone in petitioner's management knew that any of these 5 belonged to the C. I. O. union was when the international representative of the C. I. O. union (Cawley) in "the latter part of January and the month of February and possibly part of March, 1938" (App. B, p. 204) had conversations with Mr. Stipher in which he presented claims of discrimination "against the five employees" (App. B, p. 205), at one of which conversations with Mr. Stipher, Collier and Elbreg were present (App. B, p. 206). It was, however, not known to Goodrich who was responsible for the final selections for lay offs whether

any of the 69 who were laid off belonged to either I. P. and L. or to the C. I. O. union until after they had been laid off (App. B, pp. 526-527).

Collier and Elbreg both testified that they had never informed anyone in petitioner's management that they were affiliated with or interested in the C. I. O. (App. B, pp. 233-234, 274) and Goodrich, who selected them for lay off, testified he knew nothing about their union affiliation (App. B, p. 527), and that he gave no thought or consideration to the question of whether these two or any other of the 69 were affiliated with any labor organization (App. B, p. 509), nor did the General Manager to whom the list was submitted (App. B, p. 534-535). As a part of the retrenchment policy, the condenser pit jobs in which Collier and Elbreg worked, were filled by Fryman and Ferguson from the general repair gang, whose qualifications included condenser pit operation as well as ability to do general repair work and who remained available to divide their time between both types of work (App. B, pp. 513-516), and who did so (App. B, pp. 592-594). Collier and Elbreg were not qualified to do general repair work (App. B, pp. 227, 238, 603).

In selecting these men for lay off Goodrich acted upon the basis and principle for selection outlined by the General Manager in Exhibit 2, and upon nothing else (App. B, pp. 535-536). Length of service both in the plant and in the condenser pit were considered (App. B, p. 579), but was not of controlling weight. Ability, cooperation and personality were also considered (App. B, pp. 596-600). Elbreg was inclined to kill time on duty, standing around and talking to others (App. B, pp. 596, 631-633) and was the one with least experience in the condenser pit (App. B, pp. 578-579). Collier had an unpleasant disposition and acted

grouchy to the point where Goodrich had called him in during the summer of 1937 and talked to him about that disposition (App. B, p. 547) and Collier admitted that previously at one time he had threatened to lick his own foreman (App. B, pp. 277-278). Collier was third in experience in the condenser pit (App. B, p. 579). The four regular condenser pit operators who were retained were qualified to perform the additional duties of general repair work (App. B, pp. 580-581, 23), and did so (App. B, pp. 592-594).

In its findings the Board makes no attempt to point to evidence to overcome the admissions of Collier and Elbreg that prior to their lay off they had never informed anyone in petitioner's management that they were affiliated with or interested in the C. I. O. union, or to overcome the testimony of the only two (Goodrich and Humphrey) who ever mentioned the matter of labor organizations to Collier and Elbreg that they did not know that either of these men were affiliated with or interested in the C. I. O. or any other labor organization (App. B, pp. 527, 635-636.) There is no evidence to show any such knowledge on the part of the management. The C. I. O. local had not prior to the lay off made itself known to petitioner, was organized secretly so far as petitioner was concerned, never had more than fifty-two members (App. B, p. 186) out of the more than twelve hundred (Stipulation, App. B, p. 25; App. A, p. 15) of petitioner's employees, and had even ceased its secret meetings by October preceding the January when Collier and Elbreg were laid off (App. B, pp. 224, 255-256). The conversations with Collier and Elbreg referred to by the Board (App. A, pp. 135-136) did not convey information that either of these men was affiliated with or interested in C. I. O. or any union.

Nevertheless, and without evidence therefor, the Board found (App. A, p. 140) that the determining factors for the selection of Collier and Elbreg for lay off were their "general interest in unionization of the respondent's plant employees by an 'outside' labor organization, and, more especially, their participation in the abortive collective request for a wage increase of the condenser pit operators and their union leadership as president and secretary, respectively, of the U. W. O. C."

The "abortive collective request" referred to by the Board consisted of the plan of six unorganized condenser pit operators at the Harding Street plant to call on the plant engineer in a group to discuss a wage grievance. This occurred in February, 1937—three months before there was any organizational activity, and eleven months before Collier and Elbreg were laid off in 1938. There was no question of self-organization or of C. I. O., or of any other labor organization involved in that isolated group incident (App. B, pp. 271-272). It was simply a desire of six individual employees to talk wage grievances affecting only them in a group rather than individually, and the plant engineer preferred to talk to them individually (App. B, pp. 217-220; 566).

(The evidence concerning the Board's finding of interference, restraint and coercion in connection with generating plant employees in respect to the group of six condenser pit operators and the C. I. O. union.) The Board found that the discouragement by the Harding Street plant engineer in February, 1937 of a group discussion of wage grievances desired by six unorganized condenser pit operators constituted an unfair labor practice under the Act (App. A, pp. 134-135). The facts and record references concerning that incident have just been stated above, and

thereto is here added the further fact that in August of that same year (1937) petitioner did bargain collectively and contract with the labor organization organized by petitioner's employees (I. P. and L.) when a majority belonged thereto and it demanded recognition (App. B, pp. 79-112). The charge that petitioner encouraged the formation of this labor organization was ordered dismissed by the Board (App. A, p. 149).

Concerning petitioner's authoritative policy respecting labor organizations and organizational activities, the affirmative undisputed evidence is that there were no organizational activities until about June, 1937 (App. B, pp. 183-184, 222, 244, 73); that in July, 1937, when it appeared plant employees were killing time while on duty talking about organization matters and thereby derogating on plant efficiency (App. B, pp. 536-537), and had done so during the preceding month (App. B, p. 537), the matter was by plant superintendent Goodrich called to the attention of petitioner's President (Pritchard) and General Manager (Ralston) who instructed Goodrich to call a meeting and take the position with the men "that the men could join or not join, do as they liked about joining organizations, but they must not hold any meetings or carry on any meetings on the company property", also that "they should not gather in and around the different parts of the plant and carry on these conversations" (App. B, pp. 537-538). The evidence further is that through his foremen (Humphrey, Riddle, Fink and Felons) Goodrich called a meeting of plant employees for 2:30 in the day (App. B, p. 538) of July 8, 1937 (App. B, p. 536), at which meeting Goodrich called attention to a decrease in plant efficiency due to gatherings around in the plant and talking and due to noncooperation between some of the employees, and stated that

such congregating and talking in the plant must stop, told them "they could belong to any organization that they wanted to, that was their privilege". He further told them that he would be pleased to do anything he could to help them get along with each other and again told them "that it was their privilege to belong to any organization that they wanted to belong to" (App. B, pp. 540-541 481-482; 473-474; 605-606). Goodrich did not tell them they had to belong to any organization and did not mention by name either C. I. O., I. P. and L. or any other organization (App. B, p. 541, 474, 606).

Concerning this July 8 meeting, Collier testified (App. B, pp. 248-249) he was present and heard Goodrich also Cronin mention C. I. O. to the men and heard them discourage membership in that union (exactly opposite to the fresh instructions of the President and General Manager given Goodrich), but it was indisputably proven that Collier was not present at the meeting and was at the time working with Elbreg in a condenser pit two floors below (App. B, p. 463), that he was coming up from below after the meeting had been adjourned (App. B, pp. 483-484, 543-544, 608), and that no such statements were made either by Goodrich or Cronin (App. B, pp. 541-543, 474-475, 482-483, 607). The Board's findings shun that false testimony of Collier.

About two or three weeks *after* the July 8, 1937 meeting Goodrich called Collier to his office because he had noticed Collier was "more or less grumpy and grouchy" and he wanted to see whether he could improve Collier's attitude. Concerning this both Goodrich and Collier testified and both agree that the C. I. O. union was not mentioned (Goodrich, App. B, pp. 547-548; Collier, pp. 251-252). In a purported partial quotation of Collier's testimony (App. A,

pp. 135-136), the Board's finding unjustifiably interpolates "the U. W. O. C." so as to attribute to Goodrich a statement against that union, and this in face of petitioner's authoritative policy to the contrary, communicated by Goodrich to the men on order of the President and General Manager just two weeks earlier.

The Board states (App. A, p. 136) that on another occasion Goodrich summoned another employee, spoke to him about "outside" unions and warned him "to be careful where he went" that "if things didn't turn up right he may slip later on", but neither the time nor the employee are identified by the Board. The only testimony in the record to which that could relate is that of employee Hiter S. Young (App. B, pp. 128-138), who testified that Goodrich called him to his office (when, not shown) and talked to him about organizations, that "The C. I. O. was not mentioned" (App. B, p. 132), that Goodrich "just advised me about certain things around, that is all you know", that "He just told me to be careful where I went and that was all right; that was good advice", that Goodrich did not ask anything about the C. I. O. organization or whether Young was a member of it (App. B, pp. 134-135). Concerning a question whether Young had told one Nelson in substance that Goodrich told Young he should discourage the union and that if the union came into the plant Goodrich could get along without him, Young testified "Mr. Goodrich didn't tell me that he could discharge me for belonging to any union. He said if things didn't turn up right I may slip later on, after awhile. He didn't say he could discharge me" (App. B, p. 137), and that Goodrich "never mentioned C. I. O." and never did tell him any such thing as the question of the Board's counsel implied (App. B, pp. 137-138).

Elbreg's foreman, Humphrey, in June or July, 1937, caught him loitering and admonished him to give more attention to his work. Elbreg asked Humphrey what the company's attitude was toward organizations, to which Humphrey replied he did not know, but said: "In my opinion I can't see why all you men would go into it, but if you feel that you must have an organization, have one organization rather than three or four factions fighting each other" (App. B, pp. 631-633). No organization was mentioned by name (App. B, pp. 633-634). Elbreg's version that Humphrey questioned him and argued against C. I. O. (relied on by the Board, App. A, p. 136) is denied by Humphrey (App. B, pp. 634-635) and is contrary to the company's authoritative policy as determined by its President and General Manager (App. B, p. 537) and as communicated to the men at the meeting of July 8 (App. B, pp. 540-541).

Collier's testimony that in July 1937, foreman Humphrey told him that "We know that the C. I. O. is coming in, but we are going to try to keep it out as long as we can" (App. B, pp. 252-253), relied on by the Board with the substitution of "respondent" for "we" (App. A, p. 136), is denied by Humphrey (App. B, p. 636) and is contrary to said authoritative policy of the company.

The Board refers to unsuccessful interrogation by foreman Humphrey of "another employee" about U. W. O. C. (App. A, p. 136), who it is said refused to speak for fear of losing his position. The only other witness who testified about any conversation with foreman Humphrey was Milton Ferguson (App. B, pp. 139-153). Ferguson testified that he himself opened the conversation and asked Humphrey which organization it was best to join (App. B, pp. 145-146), but Humphrey gave him no advice and "left me suspended in the air. I didn't know which way

to turn after I talked to him" (App. B, p. 146) and that what Humphrey said "didn't discourage or encourage me either way," and if Humphrey had a preference "he didn't lay it open to me" (App. B, p. 147). In answer to a question whether Ferguson told others that Humphrey threatened Ferguson's job if he did not tell what he knew about C. I. O., Ferguson said the statement was twisted and that he said if he did know anything he would give no information to jeopardize his job (App. B, pp. 148-149). But Humphrey did not talk to him about C. I. O.—only "about organization" (App. B, p. 142), and thereafter Ferguson joined C. I. O. (App. B, p. 146).

The Board relies on a statement by assistant engineer McKay to an employee "That a union would result in 'strikes and everything' and that the employees would lose their jobs" (App. A, p. 136). The reference is to the testimony of Roy A. Payton (App. B, pp. 294-295) where he said that upon his return to the Perry W plant from the Harding Street plant he and McKay got to talking "about different places to work," and that McKay said "he used to work at some railroad job, about belonging to the union, and this, that and the other, and what they would get into, you know, come on strikes and everything, and lose their jobs, and one thing and another along that line" (App. B, p. 294), McKay was narrating his personal experiences, and was not saying, as the Board puts it, that a union here would result in strikes and the employees would lose their jobs. McKay did not mention C. I. O. or any organization being considered by Payton (App. B, pp. 294-295). Payton is one as to whom the complaint was dismissed (App. A, p. 149).

The only other circumstance referred to and relied on by the Board is the statement (App. A, p. 136) that Fore-

man Houston questioned an employee whether he belonged to U. W. O. C., but the employee's name is not given. The witness in question was Harry Wilkins, a nephew of foreman Houston (App. B, p. 433), who testified that Houston (his uncle) once asked him whether he belonged to C. I. O., and to which he said "No" (App. B, pp. 432-433). Wilkins admitted he did a lot of drinking (App. B, p. 449), and the evidence is that he would leave work without permission (App. B, p. 619), asked permission to leave on false pretexts and would go to a tavern to drink (App. B, pp. 619-621). The complaint was dismissed as to Wilkins (App. A, p. 149).

There is no evidence that any employee was ever threatened or coerced with respect to membership in the C. I. O. or any other labor organization, or that anyone refrained from joining the organization of his choice. Every witness who testified that he had been asked or told about the C. I. O. or other union did in fact join C. I. O. Collier joined C. I. O., and was elected president (App. B, p. 254), so did Elbreg and was elected secretary (App. B, p. 225), also Payton joined (App. B, p. 289), and Wilkins (App. B, p. 441), and Logsdon (App. B, p. 322), and Ferguson (App. B, p. 140), and Young (App. B, p. 130). The reason why the C. I. O. local failed to grow was that the employees were interested in I. P. and L. and not in C. I. O. (App. B, p. 187.)

(The evidence concerning the Board's findings that petitioner supported and encouraged membership in I. P. and L.) The Trial Examiner found that the evidence does not support the charge that petitioner encouraged the formation of I. P. and L. or coerced its employees into joining it (App. A, p. 61), and the complaint was dismissed by the Board in so far as it alleged that petitioner encouraged formation of the Association (App. A, p. 149).

The Board, however, found (App. A, pp. 142-143) that the Association was "favored and actively supported by the respondent," that respondent encouraged membership in the Association, and that the Association has "never been a freely chosen labor organization and collective bargaining representative of its employees." There is no evidence to support these findings, and the undisputed, affirmative evidence introduced by the Board itself is to the contrary (App. B, pp. 70-128).

Prior to July 1937, a group of employees deemed it to be in the interest of the employees of the petitioner to form "an organization sufficiently large to manage our own affairs without outsiders coming in and telling us what to do" (App. B, p. 115). They retained an attorney on their own responsibility to assist in perfecting the organization (App. B, pp. 116-117). The organization was perfected, directors and officers chosen, members enrolled, and by late July a clear majority of the total number of employees had joined the Association (App. B, pp. 117-128). Their attorney advised them they could not solicit members on company time or company property (App. B, p. 76). After a majority of the employees had joined the Association, its officers demanded of petitioner's President that petitioner recognize the Association as the sole bargaining agency for the employees (App. B, pp. 78-79). The company's President appointed a committee from the company's management to check the claims that a majority of the employees belonged to the Association. Recognition of the Association followed, collective bargaining with it ensued, and by about September 1, 1937, a contract was entered into between the company and the Association respecting wages, grievances, etc. (App. B, pp. 79-112.) There is no evidence that either C. I. O. or any other labor organization, except I. P. and L. demanded recognition or

in anywise made itself known to petitioner at any time in the year 1937. Not until late January 1938, following the lay off of a number of men, including Collier and Elbreg, did petitioner learn of the existence of the C. I. O. local. This was when the international representative, Cawley, called on Stipher and claimed that Collier and Elbreg and three others had been discriminatorily discharged (App. B, pp. 204-205).

The Board states (App. A, p. 142) that memberships in the organization were solicited on company time and property with its acquiescence and consent. There is no evidence to support the statement and none is pointed to by the Board. The Board's statement (App. A, p. 142) that Williams (an engineer at the radio station) told Rennaker that "respondent" felt the Association was a move in the right direction and that "respondent" would consider it the right thing if the employee would join it, is incorrect. The testimony on this is (App. B, p. 366) that Rennaker asked his friend Williams what *Williams'* idea about the Association was, and that Williams said "*he* felt that it was a move in the right direction for the employees," and that "*he* felt that the company would consider it the right thing if an employee would join the Protective Association." The "respondent" is not Williams, but Indianapolis Power & Light Company, whose authoritative policy established by its President and General Manager then was that the employees should be free to join, or not join, any labor organization (App. B, pp. 537-538).

The Board states (App. A, p. 142) that foreman Houston asked "an employee" whether he had been invited to join I. P. and L. and when told no, he said "somebody will." The employee in question was Houston's drinking nephew, Harry Wilkins (App. B, p. 434), but Wilkins did not say

that Houston said anyone on behalf of the company would invite him to join. It was likely someone on behalf of the Association would invite him.

In footnote "29" (App. A, p. 142) the Board states that one Deems, a "supervisor" told Rennaker in *November*, 1937 that he was holding up the works by not joining and that Deems finally "compelled" Rennaker to join the Association. Deems was not a "supervisor" and was in no position to compel Rennaker to join, and Rennaker was not holding up the works, the Association already having a majority in July and already having entered into a contract on September 1.

Rennaker was a radio technician at station WFBM (App. B, p. 340) and Deems looked after the addressograph work out of the Circle office (App. B, p. 111) and was not a member of the radio station personnel (App. B, p. 361). Rennaker's testimony on the subject is (App. B, pp. 370-371) that Deems said Rennaker was one of the last to sign a card "or at least he inferred that I was holding up the works, so to speak, by virtue of me not having signed a card, which was sort of silly to me. I didn't see why they should have to keep pestering me with signing a card if they had the majority as they claimed to have had." Rennaker did not testify that Deems "compelled" him to join, but said on being asked to join one afternoon after Deems "gave me another sales talk" he said "O. K., I will sign the card. You say everyone else has," (App. B, p. 371).

There is no evidence that petitioner rendered any financial or other support to the Association or persuaded any employee to join it, and the affirmative evidence shows the Association to be a bona fide labor organization freely organized and chosen by a majority of the employees in

the exercise of their right of self-organization (App. B, pp. 70-128).

IV

SPECIFICATIONS OF ERRORS INTENDED TO BE URGED

The errors stated below and urged by the petitioner consist of the erroneous action by the Circuit Court of Appeals in respect to the several law questions stated in the foregoing petition for certiorari under the heading (III) "THE QUESTIONS PRESENTED," and referred to under the heading (IV) "THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT."

1. The Circuit Court of Appeals erred in deciding that its power has been curtailed by "recent rulings of the Supreme Court," particularly in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584 and *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206, and that as a matter of law it was required to treat as conclusive the Board's several findings in this case relating to generating plant employees, and that it was thereby precluded from making its own independent determination of the law question whether said findings are supported by evidence on the basis of the criterion established in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229, viz.; that such findings must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (The findings referred to in the foregoing specification are that petitioner discriminatorily discharged Sidney Collier and Thomas Elbreg because of affiliation with the C. I. O. local, that it discouraged membership in the C. I. O. local and interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and that

it supported and encouraged membership in I. P. and L. Employees' Protective Association; also the findings subsidiary thereto).

2. The court erred in departing from the accepted and usual course of judicial proceedings in this type of case so as to call for the exercise of the Supreme Court's power of supervision, in that the lower court failed to make its own independent determination of the question whether the aforesaid findings of the Board are supported by evidence on the basis of said established criterion and in that the opinions filed in the case fail to point out legally sufficient evidence to support said findings or to discuss even the finding that petitioner supported and encouraged membership in the employees' Association.

3. The aforesaid findings of the Board are not supported by evidence on the basis of the aforesaid criterion and are clearly improper, and the court erred in allowing them to stand and in granting enforcement of the order made thereon.

4. The court erred in deciding that where, as here, direct evidence which to the court seems "convincing" establishes a reasonable and lawful explanation for inclusion in a general lay off, economically necessary, of individuals (Collier and Elbreg) claiming to have been discriminatorily discharged because of union affiliation, but who admit they never informed management of such affiliation and management denied knowledge or consideration thereof, the Board need not overcome such explanation with evidence to the contrary but may, on authority of *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, draw an inference of discriminatory discharge from the whole record, which the reviewing Court is "powerless to disturb" irre-

spective of whether such inference is supported by evidence under the established criterion.

5. The court erred in deciding that "Under the many rulings of the Supreme Court relating to the conclusiveness of the Board's findings" it is "constrained" to hold that rights guaranteed by Section 7 of the Act were violated when, before there were any organizational activities, the plant engineer was unwilling to discuss with an unorganized group of six condenser pit operators wage grievances affecting only them, but who was willing to discuss with them individually their individual wage grievances.

V

SUMMARY OF ARGUMENT

Proposition 1 (Re: Specification of Error No. 1)

Notwithstanding its views to the contrary as expressed in its opinions filed in this case, the Circuit Court of Appeals had the power and duty to make its own independent determination in this case of the law question presented, viz.; whether the challenged findings of the Board relating to generating plant employees are supported by evidence judged on the criterion established in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229, viz.; that the Board's findings must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." No subsequent decision by the Supreme Court has changed that criterion, or derogated upon either the power or duty of reviewing courts to test findings of the Board on the basis of that criterion.

The lower court misconstrued the reversal and the reversing opinion in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, also the case of *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206, and other "recent rulings of the Supreme Court," referred to in its opinions, when it held that thereby it has been rendered "powerless to disturb" findings of the Board though obviously in this case the lower court does not believe that the findings are supported by evidence judged on the basis of the established criterion. By so holding, the lower court decided erroneously an important question of federal judicial power in a way that conflicts with the decision in the *Consolidated Edison Company* case and with every decision made by the Supreme Court in cases under the National Labor Relations Act where the

sufficiency of evidence to support findings of the Board was a question.

According to the applicable decisions of this Court, the question of whether challenged findings of the Board are supported by evidence, judged on the basis of the criterion established by the Supreme Court in the *Consolidated Edison Company* case, is a question of law for determination by the courts and the setting aside of an order of the Board which is based on findings not thus supported by evidence is the correction of an error of law within the power conferred on the courts by Section 10 of the Act. This is recognized in the opinions and decisions of every case decided by this Court under the Act where there was involved the question whether challenged findings of the Board were supported by evidence. Those cases are:

Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 301 U. S. 142, 81 L. Ed. 965 (April 12, 1937);

N. L. R. B. v. Pacific Greyhound Lines, 303 U. S. 272, 82 L. Ed. 838 (Feb. 28, 1938);

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 83 L. Ed. 126 (Dec. 5, 1938);

N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. Ed. 627 (Feb. 27, 1939);

N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U. S. 292, 83 L. Ed. 660 (Feb. 27, 1939);

N. L. R. B. v. Sands Manufacturing Co., 306 U. S. 332, 83 L. Ed. 682 (Feb. 27, 1939);

N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241, 84 L. Ed. 219 (Dec. 4, 1939);

N. L. R. B. v. Waterman Steamship Corporation, 309 U. S. 206, 84 L. Ed. 704 (Feb. 12, 1940);

National Licorice Co. v. N. L. R. B., 309 U. S. 350, 84 L. Ed. 799 (March 4, 1940);

N. L. R. B. v. Bradford Dyeing Association, 310 U. S. 318, 84 L. Ed. 1226 (May 20, 1940);

H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514, 85 L. Ed. (Adv. Op.) 303 (Jan. 6, 1941);

N. L. R. B. v. Link-Belt Co., 311 U. S. 584, 85 L. Ed. (Adv. Op.) 325 (Jan. 6, 1941).

Proposition 2 (Re: Specification of Error No. 2)

The accepted and usual course of judicial proceedings in this type of case is for the reviewing court to make its own independent determination of the question whether challenged findings of the Board are supported by evidence on the basis of the criterion established in the *Consolidated Edison Company* case, and to exhibit in the written opinion evidence deemed legally sufficient to support such findings as are allowed to stand. The opinions filed in the instant case disclose that such course was not followed in this case in respect to the findings relating to generating plant employees. No such independent determination of the question of legal sufficiency of evidence was made and the opinions are barren of any recital or description of evidence deemed legally sufficient to support the findings, and the finding of support and encouragement of membership in the employees' Association is not even discussed by the court. The explanation for this departure is clear from the opinions themselves, where it appears that the court erroneously felt that no matter what it might think of the legal sufficiency of the evidence it was obliged to allow the findings to stand by reason of "recent rulings of the Supreme Court", particularly by reason of the decision in the *Link-Belt Company* case. Far from suggesting such a departure from accepted and usual course of proceedings

of this nature, the very Supreme Court cases cited by the lower court (*N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584; *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S 206) follow and illustrate the accepted and usual course. In those cases, as in others, this court made a determination of the law question of whether findings were supported by evidence and in its opinions devoted much space to a recital and exhibition of evidence deemed legally sufficient. Such opinions are highly important for the guidance of everyone affected by the National Labor Relations Act and by its administration.

Said accepted and usual course is generally followed in other circuits, and was followed in the Seventh Circuit prior to the reversal in the *Link-Belt Company* case. Following is a list of sample cases from each circuit in which said accepted and usual course is illustrated:

First Circuit—*N. L. R. B. v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874 (1941);

Second Circuit—*N. L. R. B. v. Arma Corporation*, 122 F. (2d) (Adv. Ed.) 153 (1941);

Third Circuit—*N. L. R. B. v. Moltrup Steel Products Co.*, 121 F. (2d) (Adv. Ed.) 612 (1941);

Fourth Circuit—*F. W. Poe Mfg. Co. v. N. L. R. B.*, 119 F. (2d) 45 (1941);

Fifth Circuit—*N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, 122 F. (2d) (Adv. Ed.) 433 (1941);

Sixth Circuit—*N. L. R. B. v. Sparks-Withington Co.*, 119 F. (2d) 78 (1941);

Seventh Circuit—*Foote Bros. Gear & Machine Corp. v. N. L. R. B.*, 114 F. (2d) 611 (1940);

Eighth Circuit—*Texarkana Bus Co. v. N. L. R. B.*, 119 F. (2d) 480 (1941);

Ninth Circuit—*N. L. R. B. v. Grower-Shipper Vegetable Assn.*, 122 F. (2d) (Adv. Ed.) 368 (1941);

Tenth Circuit—*Nevada Consol. Copper Corp. v. N. L. R. B.*, 122 F. (2d) (Adv. Ed.) 587 (1941);

Court of Appeals (D. C.)—*Press Co., Inc. v. N. L. R. B.*, 118 F. (2d) 937 (1940).

Proposition 3 (Re: Specification of Error No. 3)

The Board's said findings relating to generating plant employees, viz.: that petitioner discriminatorily discharged Sidney Collier and Thomas Elbreg, two condenser pit operators at the Harding Street plant; that it discouraged membership in the C. I. O. local and interfered with, restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act; and that petitioner supported and encouraged membership in I. P. and L. Employees Protective Association, and the findings subsidiary thereto, are not at all supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and the evidence is contrary to said findings. These findings are in direct conflict with petitioner's policy established by its President and communicated to the plant employees that each employee is free to belong, or not belong, to any labor organization (App. B, pp. 536-541).

The facts relating to the subject matters of said findings are fully and concisely set forth under appropriate topics at pages 7 to 22 of this brief, to which reference is here made. It there appears that the undisputed affirmative evidence is to the exact contrary of the facts as found by the Board in said findings, and that petitioner is not guilty of any unfair practice under the Act.

Collier and Elbreg were included in a general lay off, economically necessary, and were selected for that purpose on the lawful basis outlined in a written order of the General Manager of December 14, 1937. Both of these men admitted they never had informed anyone in the management that they were affiliated with the C. I. O. local and management testified that it had no knowledge of such affiliation. There can be no discouragement of membership in the C. I. O. local attributed to petitioner in view of its authoritative policy as established by its President and communicated to the men that each employee is free to join or not join any labor organization. The employees' Association is a bona fide, lawful labor organization and petitioner never has supported it or encouraged membership in it.

Proposition 4 (Re: Specification of Error No. 4)

In view of the direct and undisputed evidence showing a reasonable and lawful explanation for the inclusion of Collier and Elbreg in the general lay off, as set forth in pages 7 to 12 of this brief and to which reference is here made, the burden was on the Board to overcome that explanation with evidence and to establish with evidence to the contrary that these men were discriminatorily discharged. *Nevada Consolidated Copper Corp. v. N. L. R. B.* (C. C. A. 10, Aug. 27, 1941), 122 F. (2d) (Adv. Ed.) 587, 595, 598; *N. L. R. B. v. Tex-O-Kan Flour Mills Co.* (C. C. A. 5, Aug. 5, 1941), 122 F. (2d) (Adv. Ed.) 433, 438, 439; *Martel Mills Corp. v. N. L. R. B.* (C. C. A. 4, Sept. 6, 1940), 114 F. (2d) 624, 631. The Board offered no evidence to discharge that burden and made a finding of discriminatory discharge that has no support in the evidence.

The Board was not authorized to draw and rely upon a baseless inference that Collier and Elbreg were discrimi-

natorily discharged in view of the direct evidence to the contrary. Fact inferences must themselves have support of substantial evidence, *Wilson & Co. v. N. L. R. B.*, (C. C. A. 7, June 24, 1941) 120 F. (2d) 913, 916, 919, 920; *Nevada Consolidated Copper Corp. v. N. L. R. B.* (C. C. A. 10, Aug. 27, 1941), 122 F. (2d) (Adv. Ed.) 587, 595, 598; *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, (C. C. A. 5, Aug. 5, 1941) 122 F. (2d) (Adv. Ed.) 433, 438, 439. The case of *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584 does not, as claimed in the opinion below authorize an inference of discriminatory discharge of Collier and Elbreg.

The order to reinstate Collier and Elbreg amounts, under the circumstances, to an invasion by the Board of the employer's right to make a lawful selection of employees for a lawful lay off and to a substitution of the Board's judgment for that of the employer as to what particular individuals should not be laid off—something the Board has no authority to do, *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 46, (1937); *Martel Mills Corp. v. N. L. R. B.* (C. C. A. 4, 1940), 114 F. (2d) 624, 633; *N. L. R. B. v. Union Pac. Stages Inc.*, (C. C. A. 9, 1938), 99 F. (2d) 153, 177.

Proposition 5 (Re: Specification of Error No. 5)

The unwillingness of the plant engineer, in February, 1937 before there was any organizational activity, to discuss with an unorganized group of six condenser pit operators wage grievances affecting only them individually, was not a violation of any right guaranteed to them by Section 7 of the Act, *Midland Steel Products Co. v. N. L. R. B.* (C. C. A. 6, 1940), 113 F. (2d) 800, 803. These six represented no one but themselves and did not constitute a bargaining unit under any kind of test. The incident was wholly iso-

lated and apart from anything in the nature of self-organization or anything else sought to be protected by the Act. The facts concerning this matter appear at pages 12 to 13, this brief.

No case has been found which interprets the Act as applying to anything of the nature of this isolated, unorganized group incident; an interpretation of the Act that would require the employer to negotiate with small sporadic unorganized groups of employees would tend to defeat a principal purpose of the Act, viz.; to encourage collective bargaining with representatives chosen by a majority of the employees employed in a unit considered to be an appropriate unit for collective bargaining.

ARGUMENT

Petitioner feels strongly that in view of the questions presented (p. 31 of petition for certiorari) and of the reasons relied on for allowance of the writ (p. 33 of the petition), certiorari should be granted and the case should be reviewed on the merits. Errors of law made in this case by the Board, in improperly making findings without support of substantial evidence and contrary to the overwhelming direct evidence and in ordering remedies thereon, have gone uncorrected because of further errors of law made by the court below as a result of its misinterpretation and misapplication of the decision and opinion in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584 and of other "recent rulings of the Supreme Court." The harm of these errors extends not only to petitioner in this particular case, but the declarations in the opinions below of curtailed power to review and correct errors in this type of case are calculated to discourage prosecutions of review proceedings as contemplated by Section 10 of the National Labor Relations Act by those who may feel aggrieved by orders of the Board.

(Re: Proposition 1 (ante)—That the lower court had the power and duty to make its independent determination whether the challenged findings of the National Labor Relations Board are supported by evidence on basis of the criterion established in Consolidated Edison Company case, and that lower court's holding that recent decisions of Supreme Court have rendered it "powerless to disturb" findings of the Board in this case is in conflict with applicable decisions of the Supreme Court.)

The first opinion delivered in the case by the court below discloses that it interpreted "recent rulings of the Supreme Court", particularly the decision and opinion in

N. L. R. B. v. Link-Belt Co., 311 U. S. 584, as holding that the question of whether the findings of the Board are based "on more than a scintilla of evidence or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion" is not a question of law for the courts but that it is a question of fact for the Board (R., Vol. III, pp. 31-32); and the lower court concluded that "Under these decisions we are powerless to disturb the Board's findings" (R., Vol. III, p. 32). So, in its first opinion the lower court treated as conclusive all of the Board's findings of fact, not as a result of any independent determination on its part of the question whether the findings are supported by substantial evidence, but because it felt itself in any event constrained so to do by "recent rulings of the Supreme Court." The following paragraphs from the first opinion disclose what has just been indicated (R., Vol. III, pp. 31-32):

> "In addition to these provisions, another section of the same law provides that the aggrieved party may have a review of the Board's order in this court. We have always presumed that this provision authorized us to correct what we in good faith thought was error of law in the Board's findings and order, including the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.
>
> Counsel for respondent, however, contend that this is to weigh evidence, which we are not permitted to do, notwithstanding the fact that the statute authorizes the review, and does not limit the purposes of that review, except to say that the finding of the Board, if supported by substantial evidence, shall be conclusive. The effect of respondent's contention is that, if there is any evidence,

either direct or inferential, the Board is the sole judge as to whether its findings and order are supported by substantial evidence, that is to say, whether they are based on a mere scintilla of evidence, or on such relevant evidence as a reasonable mind might accept as adequate to support its conclusions. This contention seems to be supported in *National Labor Relations Board v. Waterman S. S. Co.*, 309 U. S. 206. There the Court said: '* * * Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with the general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act.' This language was quoted in *National Labor Relations Board v. Link-Belt Co.*, decided by the Supreme Court on January 6, 1941. Obviously we have heretofore erroneously proceeded on the theory that whether the findings were based on no more than a scintilla of evidence or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusions, were questions of law and not of fact. In so ruling we have followed the unanimous decisions of *Southern Pacific Company v. Pool*, 160 U. S. 438, 440, in the light of *Edison Co. v. Labor Board, supra*, at pages 229, 230.

In the Link-Belt case, *supra*, the Court further said: '"Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of Independent, even though they did not have the power to hire or to fire. * * * If the words or deeds of the

> supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere.' Under these decisions we are powerless to disturb the Board's findings."

To that opinion the Board addressed its motion to modify, in which the Board disclaimed the contention attributed by the Court to counsel for the Board concerning conclusiveness of the Board's findings, and in which motion the Board's position concerning the Court's power is stated thus (R., Vol. III, p. 37):

> "The Board's position adheres strictly to the numerous and consistent pronouncements of the Supreme Court; that while the reviewing court is not empowered to 'substitute its judgment on disputed facts for the Board's judgment' (*National Labor Relations Board v. Link-Belt Co.*, 61 S. Ct. 358, 365), it is clearly empowered to pass upon the question of whether or not the Board's findings are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229)."

In a response to the Board's motion to modify the opinion, the petitioner agreed that what is said in the Board's motion respecting the Court's power is "a correct statement of what this Court's power and function is as a reviewing court under the statute pursuant to which this proceeding for review was instituted," but petitioner objected to a mere modification of the opinion as requested by the Board and asked the Court to make its independent determination of the question whether the Board's find-

ings are supported by substantial evidence and thereupon to set aside the adverse parts of the order because the findings on which they are based are not so supported by evidence.

Thereupon, the Court set aside its first opinion and delivered its second and final opinion. In the last opinion the Court omitted the language to which the Board had objected and held against the findings relating to employees of radio station WFBM (which had been sold by petitioner), but in respect to the findings relating to generating plant employees, it is disclosed that the Court did not make its own independent determination of the law question whether said findings are supported by substantial evidence under the criterion established by this Court, and that said findings were treated as conclusive by the lower court without regard for its own views about the sufficiency of the evidence, because it deemed itself "constrained" to do so and "powerless to disturb" by "recent rulings of the Supreme Court." That the lower court confirmed the findings relating to generating plant employees, not as a result of its independent views of the sufficiency of the evidence, but because of its unjustified feeling of compulsion by rulings of this Court is clear from the following portion of the final opinion (R., Vol. III, pp. 62-64):

> "While the evidence was by no means undisputed, we can not say **under the recent rulings of the Supreme Court**, that there was none of sufficient substance to support the following facts as found by the Board. In February, 1937, before any union was organized or attempted to be organized, the six condenser pit operators employed at one of the plants had decided to make a collective request relating to working conditions through the chief engineer at that plant. Before they did so, the engineer, Goodrich, learned of their decision and talked to them individually, telling

them they were absolutely wrong to try to approach petitioner collectively, and that while it would confer with individual operators about working conditions, it would not meet with them as a group. Thereafter, the C. I. O. undertook to organize workers at the generating plants, and after an organizational meeting, a local was formed, and Collier and Elbreg were elected president and secretary in August, 1937. There is evidence, though disputed, that the management sought by inquiry and admonition to discourage enrollment in that union. Under the many rulings of the Supreme Court relating to the conclusiveness of the Board's findings, we are constrained to hold that there was evidence in support of the finding that petitioner interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Sec. 7 of the Act.

In December, 1937, petitioner's general manager sent two communications, the first addressed to department heads, and the second to Goodrich, superintendent of plants, calling for a general reduction in operating expenses, necessitated by failing business and the poor outlook for the future. He called for a reduction in personnel by not replacing employees who left, and by laying off employees wherever possible, stating that in such layoffs, the generating system as a whole was to be considered, and employees were to be considered on the basis of merits, efficiency, and length of service with the company. In response to this requirement of reduction in the personnel, about seventy employees were discharged between January 4 and March 30, 1938, including Collier and Elbreg who were discharged on January 5, 1938. Of this number only five were members of C. I. O., and the complaint as to the other three was dismissed on motion of respondent.

The Board found that Collier and Elbreg were discharged because of their activities in the union which by that time had ceased to function. Petitioner intro-

duced what would seem to us **convincing** evidence to the contrary, were we triers of the facts. However, in view of the fact that the Board is permitted to draw its own inferences from all the facts, and (under the ruling in *Labor Board v. Link-Belt Co.*, 311 U. S. 584), may rely upon such inferences in the absence of direct evidence in support of its findings, in opposition to direct evidence to the contrary, **we are not permitted to disturb** the order based on the finding of the discriminatory discharges.

The pertinent statute provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' The Supreme Court has held that the word 'evidence' as here used means 'substantial evidence,' and '* * * is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Edison Co. v. Labor Board*, 305 U. S. 197 at p. 229. The statute further provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' Section 10(b). The last cited case has this to say on that subject: 'The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. (Citing cases.) But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.'

In addition to these provisions, another section of the same law provides that the aggrieved party may have a review of the Board's order in this court. We have always presumed that this provision authorized us to correct what we in good faith thought was error of law in the Board's findings and order, including the determination whether the Board's findings were

based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. See *Southern Pacific Co. v. Pool,* 160 U. S. 438, 440; *Edison Co. v. Labor Board, supra,* 229, 230.

In *National Labor Relations Board v. Waterman S. S. Co.,* 309 U. S. 206, the Court said: '* * * Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with the general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act.' This language was quoted in *National Labor Relations Board v. Link-Belt Co.,* 311 U. S. 584.

In that case, the Court further said: '"Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." Nor does the Board lack the power to give weight to the activities of some of the supervisory employees on behalf of Independent, even though they did not have the power to hire or to fire. * * * If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere.' Under these decisions **we are powerless to disturb** the Board's findings with respect to Collier and Elbreg." (Our emphasis.)

The question whether the Board's finding that petitioner supported and encouraged membership in I. P. and L. is

supported by substantial evidence did not even receive passing mention in the opinion.

The reversal and the reversing opinion of January 6, 1941, in the *Link-Belt Company* case, referred to in the lower court's opinion, seem to be responsible for this situation. But nothing in that case relieved the lower court in the instant case from its duty to make its own independent determination of the law question whether the challenged findings in this case are, on the basis of its record, supported by substantial evidence. Nor did the *Link-Belt Company* case render the lower court "powerless to disturb" the findings in question or require it to treat them as conclusive. True, it was in that case said: "Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary." That statement was made in connection with the statement, "But we are of the opinion that the Court of Appeals in reaching that conclusion substituted its judgment on disputed facts for the Board's judgment—a power which has been denied it by the Congress." The difficulty of the lower court, as disclosed in its opinion, seems to be that it has failed to appreciate the clear distinction that exists between doing the forbidden thing of weighing evidence and substituting the Court's judgment for that of the Board on disputed facts, and doing the permitted and required thing of determining whether as a matter of law there exists substantial evidence as support for a challenged finding of fact. The Court's power and duty to do the latter was not derogated upon by the decision in the *Link-Belt Company* case or by any other case decided by the Supreme Court.

The criterion established in *Consolidated Edison Company v. N. L. R. B.*, 305 U. S. 197, 229 for testing the suf-

ficiency of evidence in these cases, viz.; that the Board's findings must be supported by "substantial" evidence, and that "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," has not been discarded or changed by any decision of this Court. It was restated with clarity and fullness in *N. L. R. B. v. Columbian E. & S. Co.*, 306 U. S. 292, 299, where it was said that findings of the Board must be supported by "evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred", and that "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' * * *, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Under that criterion this Court has determined the law question whether challenged findings of the Board were supported by evidence whenever it was presented in cases under the National Labor Relations Act decided by it. Power is clearly conferred on Circuit Courts of Appeal by Section 10 of the Act to make that determination. In none of the cases decided by the Supreme Court was the state of the evidence sufficiently similar to the evidence, or lack of it, in the instant case so as to constitute any one or all of them authority for requiring the lower court to treat as conclusive the Board's findings here in question. The facts in these cases vary too much to make the decision in one case decisive of another where the sufficiency of evidence is in question.

In holding that the Court is "constrained" and rendered "powerless to disturb" the Board's findings in this case by reason of recent decisions and rulings of the Supreme Court made in other cases, the lower court decided the important question of its power and duty under the Act erroneously and in a way that conflicts with each and all of the following decisions of this Court:

Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 301 U. S. 142, 81 L. Ed. 965 (April 12, 1937);

N. L. R. B. v. Pacific Greyhound Lines, 303 U. S. 272, 82 L. Ed. 838 (Feb. 28, 1938);

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 83 L. Ed. 126 (Dec. 5, 1938);

N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. Ed. 627 (Feb. 27, 1939);

N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U. S. 292, 83 L. Ed. 660 (Feb. 27, 1939);

N. L. R. B. v. Sands Manufacturing Co., 306 U. S. 332, 83 L. Ed. 682 (Feb. 27, 1939);

N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241, 84 L. Ed. 219 (Dec. 4, 1939);

N. L. R. B. v. Waterman Steamship Corporation, 309 U. S. 206, 84 L. Ed. 704 (Feb. 12, 1940);

National Licorice Co. v. N. L. R. B., 309 U. S. 350, 84 L. Ed. 799 (March 4, 1940);

N. L. R. B. v. Bradford Dyeing Association, 310 U. S. 318, 84 L. Ed. 1226 (May 20, 1940);

H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514, 85 L. Ed. (Adv. Op.) 303 (Jan. 6, 1941);

N. L. R. B. v. Link-Belt Co., 311 U. S. 584, 85 L. Ed. (Adv. Op.) 325 (Jan. 6, 1941).

In all of the foregoing cases it is recognized that it is the power and duty of the Court which has a case for review under the Act and in which is presented the question whether findings of the Board are supported by evidence to make its own independent determination of that question under the established criterion and upon an examination of the particular record before it. The opinions delivered by the lower court in the instant case disclose that because of its misinterpretation of this Court's decisions it did not make a determination in this case of the question whether under the established criterion the Board's findings here in question are supported by substantial evidence. The findings here in question are: That Sidney Collier and Thomas Elbreg were discriminatorily discharged; that petitioner discouraged membership in U. W. O. C. and interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act; and that petitioner supported and encouraged membership in I. P. and L.; and the findings subsidiary thereto. It will be shown later in the argument that none of these findings of the Board are supported by substantial evidence under the test of the established criterion, but that they are contrary to the direct evidence in the case.

(Re: Proposition 2 (ante)—That in failing to determine whether said findings are supported by substantial evidence under the established criterion and in failing to point out in the opinion evidence deemed legally sufficient to support said findings, the lower court so far departed from the accepted and usual course of proceedings in this type of case as to call for the exercise of this Court's power of supervision.)

It is clear from the opinions below that the lower court failed to make its own independent determination of the

law question whether, under the established criterion and the state of the evidence in this case, the Board's findings here in question are supported by substantial evidence. For example, the final opinion does not even mention, much less discuss, the Board's finding that petitioner supported and encouraged membership in I. P. and L., in connection with the question whether that finding is supported by substantial evidence. Yet the opinion enforces the Board's order based on this finding. As to the other findings here in question, the final opinion says that by virtue of the *Link-Belt Company* case and other "recent rulings of the Supreme Court," the lower court was "constrained" to confirm, or rendered "powerless to disturb," the findings. Nor does the final opinion point out any specific evidence deemed to be legally sufficient to support the findings, either under test of the established criterion or under test of the lower court's misinterpretation of the rulings and decisions of this Court.

Both the failure to make its own independent determination of the sufficiency of the evidence under the established criterion, and the failure to point out specific evidence deemed legally sufficient constitute such departures by the lower court from the accepted and usual course of proceedings in this type of case as to call for the exercise of this Court's power of supervision. The accepted and usual course is for the reviewing court to make such independent determination of sufficiency of the evidence under the established criterion when the question of sufficiency is presented, and in the opinion delivered to point to specific evidence deemed by the court to be legally sufficient. This accepted and usual course is indeed well illustrated by the two cases cited in the lower court's opinion as impediments to that course. In the *Link-Belt Company* case, cited in the opinion, this Court did make an independent

determination of the question whether the evidence was sufficient to support the challenged findings, and the opinion in the case devotes *eight* pages to a consideration of specific testimony and evidence deemed by this Court as legally sufficient. In the other case cited by the lower court, *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206, this Court likewise made its independent determination of the question of the sufficiency of evidence to support findings there challenged, and in the opinion devoted *seven* pages to a consideration of specific testimony and evidence deemed by this court to be legally sufficient.

The following sample cases decided by Courts of Appeal under the Act, one from each circuit and the District of Columbia, including one from the Seventh Circuit decided prior to the reversal in the *Link-Belt Company* case, are illustrative of the same accepted and usual course in this type of case:

First Circuit—*N. L. R. B. v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874 (1941);

Second Circuit—*N. L. R. B. v. Arma Corporation*, 122 F. (2d) (Adv. Ed.) 153 (1941);

Third Circuit—*N. L. R. B. v. Moltrup Steel Products Co.*, 121 F. (2d) (Adv. Ed.) 612 (1941);

Fourth Circuit—*F. W. Poe Mfg. Co. v. N. L. R. B.*, 119 F. (2d) 45 (1941);

Fifth Circuit—*N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, 122 F. (2d) (Adv. Ed.) 433 (1941);

Sixth Circuit—*N. L. R. B. v. Sparks-Withington Co.*, 119 F. (2d) 78 (1941);

Seventh Circuit—*Foote Bros. Gear & Machine Corp. v. N. L. R. B.*, 114 F. (2d) 611 (1940);

Eighth Circuit—*Texarkana Bus Co. v. N. L. R. B.*, 119 F. (2d) 480 (1941);

Ninth Circuit—*N. L. R. B. v. Grower-Shipper Vegetable Ass'n.*, 122 F. (2d) (Adv. Ed.) 368 (1941);

Tenth Circuit—*Nevada Consol. Copper Corp. v. N. L. R. B.*, 122 F. (2d) (Adv. Ed.) 587 (1941);

Court of Appeals (D. C.)—*Press Co., Inc. v. N. L. R. B.*, 118 F. (2d) 937 (1940).

The importance of adherence to the accepted and usual course of proceedings in cases under this Act lies in the fact that thereby, and thereby only, are the review provisions in Section 10 of the Act given practical effect and is guidance afforded to those who desire to know what specific conduct does, or does not, constitute prohibited unfair practices within the meaning of the Act. An opinion such as the one below, insofar as it pertains to the findings relating to generating plant employees and to the employees' Association (I. P. and L.), not only fails to afford any such guidance, but it is calculated to serve notice that in the Seventh Circuit it is practically useless to seek a review when it involves a judicial determination of the question whether challenged findings of the Board are supported by substantial evidence under the established criterion.

(Re: Propositions 3 and 4 (ante)—That the findings of the Board here in question are not supported by evidence, but are contrary to the direct evidence and are clearly improper; also, that the burden was on the Board to overcome with evidence the reasonable and lawful explanation of inclusion of Collier and Elbreg in a general lay off established by direct evidence.)

(Collier and Elbreg.) Neither the general finding that Collier and Elbreg, two condenser pit operators who worked together and who were the president and secretary of the C. I. O. local, were discharged because of union affiliation or group activity, nor the findings subsidiary thereto, are supported by evidence. Said findings are contrary to the direct evidence and are clearly improper. When they were included in a general lay-off, ordered because of economic necessity, it was not even known to anyone in petitioner's management organization that these men belonged to the C. I. O. local, and both admitted that they had never informed anyone in the management that they were so affiliated. The C. I. O. local had not asked for recognition or made itself known to management. It reached only an embryonic stage, with few members, and it had quit holding meetings several months before these men were laid off. These two men, like the rest of the seventy laid off during the first half of 1938, were selected without regard to any question of union affiliation, and they were selected solely on the basis outlined in a written order of the General Manager, dated December 14, 1937, viz. (Exhibit 2, App. B, pp. 12-14; introduced p. 505; 509):

> "In laying off plant employees, however, the generating system as a whole is to be the governing basis. That is, all plant employees should be considered on the basis of merit, efficiency and length of service with the company. Necessary transfers between plants should be made as far as possible to accomplish this policy."

The full facts concerning the general lay-off in the first half of 1938, the inclusion of Collier and Elbreg in that lay off, and the reasons for their selection, are set out with record references at pages 7 to 12 of this brief. The Court's attention is directed to that statement of the facts

in order to avoid repetition here. Those facts, established by direct evidence, show a reasonable and lawful explanation for including these men in the general lay off. That explanation is not overcome by any evidence—none was even offered to overcome it. There is not a scintilla of evidence, direct or inferential, to support the finding that these men were discriminatorily discharged; much less is there "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

In the final opinion below, the court discloses that it does not view the evidence as sufficient to support the finding of discriminatory discharge of Collier and Elbreg, but the court allowed the finding to stand under supposed constraint of the *Link-Belt* case. It said that under the decisions of the Supreme Court "we are powerless to disturb the Board's findings with respect to Collier and Elbreg," and that in view of the ruling in the *Link-Belt Company* case that the Board may draw its own inferences from all the facts, "we are not permitted to disturb the order based on the finding of discriminatory discharges." In this the court below erred. The state of facts in the *Link-Belt* case concerning the men there laid off is not comparable to the facts concerning the lay off of Collier and Elbreg. In the *Link-Belt* case the record showed that two of the five men dismissed were at the time told that they were dismissed for union activities, the other three had been solicited for membership in the independent union by their night boss and had refused, and one of these three had acted openly as solicitor and grievance committee member for the outside union.

There is no comparable evidence in this case. No one in the management knew of Collier's and Elbreg's union affiliations and not a word on that subject was said or

asked when they were told of their lay off or when later they inquired whether work was again available. The *Link-Belt* case is not authority for an inference in this case that Collier and Elbreg were discriminatorily discharged, for the simple reason that no such inference can *reasonably* be drawn here and such an inference would be contrary to all of the evidence. To be valid, inferences of fact must be "reasonably" inferred. *N. L. R. B. v. Columbian E. & S. Co.*, 306 U. S. 292, 299. And an inference of discriminatory discharge drawn by the Board which cannot reasonably be drawn from the facts may not stand. *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 342.

In other circuits there have been recent decisions, handed down after the *Link-Belt* decision in which reviewing courts have set aside findings of the Board based upon inferences which did not find substantial support in the record. These cases are particularly applicable here, where petitioner has fully explained the reason for the lay off of Collier and Elbreg and the basis of their selection. They hold that when an employer gives a reasonable explanation for a lay off, the Board then has the *burden* of establishing by other relevant and substantial evidence that such explanation is false and that the actual motivating reason was union affiliation. If the Board fails in this burden, its inference and finding of discrimination cannot stand.

In *Nevada Consolidated Copper Corp. v. N. L. R. B.* (C. C. A. 10, Aug. 27, 1941), 122 F. (2d) (Adv. Ed.) 587, upon the resumption of the employer's operations after a two-year shutdown, reemployment was denied by the general manager to a number of employees who had been placed upon a list by the preceding general manager because of suspected sabotage. On the legal question of

whether there was substantial evidence in the record to support the Board's opposite fact inference that the motivating reason for the refusal to employ these men was their union affiliation, the court said at p. 595:

> "The principal question presented is whether the evidence supports the findings of the Board with respect to the motivating cause of petitioner's refusal to reemploy certain former employees. If the reason given by Boyd in his testimony under oath was a reasonable one, the **onus was upon the Board to establish the falsity of his explanation and that the motivating reason was union affiliation.**
>
> It was not sufficient for the Board to show that employment may have been refused on account of membership in Local 63 and Local 69 and of union activities. If the refusal to reemploy may have been one of two things, one illegal and the other legal, **the fact-finding tribunal may not guess or speculate** as between the two causes. There **must be satisfactory foundation in the evidence to support its conclusion.** When the evidence is consistent with either of two inconsistent hypotheses, it establishes neither.
>
> Furthermore, it was not essential that petitioner establish that the grounds upon which it refused reemployment actually existed. It is sufficient if petitioner in good faith reasonably believed they existed." (Our emphasis.)

After reviewing the record, the court concluded at p. 598:

> "We think the petitioner's explanation of the reasons which motivated its action in denying reemployment is a reasonable one under the facts and circumstances, and hold that the onus was on the Board to establish the falsity thereof. We think it is **more reasonable to infer** from the evidence that the motivating cause was the one asserted by the petitioner, rather than the one found by the Board. **But if we**

mistake in this, we think the most that can be said is that the evidence adduced leaves the matter in the **realm of speculation** and that it is as reasonable to infer therefrom that the motivating cause was that asserted by petitioner, as to infer that it was because of union affiliation or activity. If the evidence was as consistent with the hypothesis asserted by petitioner as the one upon which the Board predicated its order, it established neither.

We, therefore, conclude that the findings of the Board are not supported by substantial evidence and that the order should not be enforced." (Our emphasis.)

Other cases to the same effect are: *N. L. R. B. v. Tex-O-Kan Flour Mills Co.* (C. C. A. 5, Aug. 5, 1941), 122 F. (2d) (Adv. Ed.) 433, 438, 439; *Martel Mills Corp. v. N. L. R. B.* (C. C. A. 4, 1940), 114 F. (2d) 624, 631.

The decision below, that on authority of the *Link-Belt* case the Board was authorized to infer that Collier and Elbreg were discriminatorily discharged without overcoming with evidence the reasonable and lawful explanation established by direct evidence of their inclusion in the lay off, and in opposition to direct evidence to the contrary of such inference, is without supporting reason or precedent and is in conflict with the foregoing contra decisions in other circuits. The Board's finding of discriminatory discharge of Collier and Elbreg and the findings subsidiary thereto are clearly not supported by substantial evidence and are contrary to the direct relevant evidence.

The order to reinstate Collier and Elbreg amounts, under the circumstances, to an invasion by the Board of the employer's right to make a lawful selection of employees for a lawful lay off and to a substitution of the

Board's judgment for that of the employer as to what particular individuals should not be laid off—something the Board has no authority to do, *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 46 (1937); *Martel Mills Corp. v. N. L. R. B.* (C. C. A. 4, 1940), 114 F. (2d) 624, 633; *N. L. R. B. v. Union Pac. Stages, Inc.* (C. C. A. 9, 1938), 99 F. (2d) 153, 177. The order for their reinstatement is, therefore, not entitled to enforcement and the court erred in granting enforcement.

(U. W. O. C., and rights under Sec. 7 of the Act.) Neither the finding that petitioner discouraged membership in U. W. O. C. and interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, nor the findings subsidiary thereto, are supported by substantial evidence and are contrary to the direct evidence of petitioner's authoritative policy that any employee was free to join, or not join, any labor organization. The facts concerning this matter are fully stated with record references at pages 12 to 18 of this brief, and the Court's attention is directed thereto in order to avoid repetition here.

When in July, 1937, it became apparent that some of petitioner's employees at the Harding Street generating plant were killing time on duty evidently talking about labor organization matters, petitioner's President instructed the superintendent of plants to call a meeting of generating plant employees and inform them that more attention to duties was required *and that they were free to join or not join any labor organization* but they should not utilize company time or property for that purpose. Such a meeting was held on July 8, 1937, and the plant superintendent so instructed the men. This is the authoritative established policy of petitioner on that subject, and

has been its policy since it first became apparent that the subject of labor organization affiliation was concerning some of the men. Organizational activity of the C. I. O. local began about a month before in a way shown by the evidence to have been wholly secret from the management.

The establishment and communication to the men of the company's authoritative policy that each employee was free to join or not join any labor organization is sufficiently important to warrant setting forth the testimony thereon as given by Mr. Goodrich, the superintendent of plants. He testified as follows (App. B, pp. 536-541):

> "Q. I call your attention, Mr. Goodrich, to a meeting held in your office at the Harding Street plant on the 8th of July, 1937, and ask you to state whether you recall that meeting?
>
> A. I do.
>
> Q. Who called that meeting?
>
> A. I did.
>
> Q. Did you have any discussion with any of the management before you did that concerning that?
>
> A. I did.
>
> Q. With whom did you discuss that?
>
> A. Mr. Ralston and Mr. Pritchard.
>
> Q. Who is Mr. Pritchard?
>
> A. President of the company.
>
> Q. Did you talk to Mr. Cronin?
>
> A. Mr. Cronin was in with them.
>
> Q. What capacity did Mr. Cronin have with the office at that time?
>
> A. He was superintendent of the electrical division.

Q. What was the occasion for the discussion as to whether there should be such a meeting, between the men and the management?

A. Our report showed that the efficiency in our plants was falling off, we were not getting our work done like we had been. Our efficiency was off quite a little and the work was not being completed in time and we found that this was because of meetings or gatherings around in the plant, talk and conversation.

Q. Was that true before this July 8th meeting and for some time before that that there had been this matter of talking, say, for a year earlier?

A. Oh, yes—no, not that long.

Q. About when did that matter of talking in the plants during working hours between employees start?

A. About a month before that.

Q. Had you observed it yourself?

A. Yes, sir.

Q. Had others in the management observed it, if you know?

A. Yes, sir.

Q. What course was determined upon after it was discussed by Mr. Ralston and the rest of you?

A. It was determined that I should call a meeting and bring this to the men's attention.

Q. All right. In that meeting it was discussed, was it not, that they were talking about organization matters?

A. That is right.

Q. Yes, what were the instructions of Mr. Pritchard and Mr. Ralston to you, if any, as to what should be the position you should take with the men concerning organization work?

A. The position was that the men could join or not join, do as they liked about joining organizations, but they must not hold any meetings or carry on any meetings on the company property.

Q. Anything said about the group talking during working hours?

A. That is what I refer to when I say meetings on the company property.

Q. What was said?

A. And that they should not gather in and around the different parts of the plant and carry on these conversations.

Q. Was then this meeting decided upon?

A. Yes, sir.

Q. Now, state what time in the day it was held?

A. It was called for 2:30.

Q. Was it begun at that time?

A. Yes, sir.

* * * * *

Q. Who was there from the management?

* * * * *

A. Only Mr. Cronin, W. S. Cronin, and I.

Q. And was Mr. Humphrey present?

A. And Mr. Humphrey, yes.

Q. Who opened the meeting?

A. I did.

Q. Now, tell the Examiner what you said to the men.

A. I said that there had been a noticeable, and the management had noticed a decrease in the effi-

ciency of the operation of the plant and this was caused by gatherings around and talking at different points in the plant. It was also caused by certain feelings that different individuals had of not wanting to cooperate with other individuals. Consequently, we didn't have team work and that I wanted them to know that I wanted to go along with them in any way that I possibly could and that they had to stop, simply stop this congregating and talking around through the plant in parts of three or four.

Q. Did you tell them why?

A. Yes, because it had been called to my attention and also the efficiency of the plant, and we were not getting our work done and I also told them according to the law as I understood it and from what I knew about it that **they could belong to any organization that they wanted to, that was their privilege,** and I further went on to say that due maybe to that thought that some of those men had known each other for fifteen to twenty-five years and that they were getting at outs with each other and, consequently, by getting at outs with each other that they were not working together on the job as they should and I told them at that time that anything that I could do to help them in any way that I would be tickled to death to do it **and I told them again that it was their privilege to belong to any organization that they wanted to belong to.**

Q. Did you say anything further as to whether they had to belong to any?

A. No, sir, I didn't say they had to belong to any.

Q. I will ask you to state whether or not you mentioned anything about C. I. O. at that meeting?

A. No, sir.

Q. Did you mention anything about I. P. & L.?

A. No, sir.

Q. Did you name any organization?

A. No, sir." (Our emphasis.)

There is no evidence that any employee who desired to join the C. I. O. local failed to do so, and there is no evidence whatever of any intimidation or coercion by petitioner of any employee in respect to membership in that or any other labor organization. The Board found that the discharge of Collier and Elbreg on account of their affiliation with the C. I. O. local constituted a discouragement by petitioner of membership in that union. It has already been shown that there was no such discriminatory discharge. There was testimony (see pages 14 to 18 this brief) of earlier inquiries and remarks about the C. I. O. local by a few inferiors in the management, such as a foreman or assistant plant engineer, but no evidence that they threatened or coerced anyone. One of the subsidiary findings is that the chief engineer (Goodrich) and a foreman (Humphrey) were hostile to "outside" labor organizations. The evidence does not support the finding, but if it did, that could not overcome the direct evidence that petitioner's President determined the authoritative policy of the company by which every employee was accorded full freedom in the matter of affiliation with labor organizations, and which policy was communicated to the plant employees by Goodrich who had become general plant superintendent by that time. *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 342.

The Board's finding that petitioner discouraged membership in U. W. O. C. and the findings subsidiary thereto are clearly not supported by substantial evidence and said finding conflicts directly with the authoritative policy of the company established by direct evidence, which accorded freedom to each employee to join, or not join, any labor

organization. The "cease and desist" order made on said finding is, therefore, erroneous and not entitled to enforcement and the lower court erred in granting enforcement.

(The I. P. and L. Employees Protective Association.) The Board's finding that petitioner supported I. P. and L. and encouraged membership therein is wholly unsupported by evidence and is contrary to the direct evidence offered by the Board itself (See, testimony of Gipe and Kirkpatrick, App. B, pp. 70-128). The facts concerning the Association are set out at pages 18 to 22, this brief, to which the Court's attention is directed. The Trial Examiner found that the evidence does not support the charge that petitioner "encouraged the formation of the Association or coerced its employees into joining it," (App. A, p. 61) and the complaint was ordered dismissed insofar as it alleged that petitioner encouraged formation of the Association (App. A, p. 149). The direct evidence shows that the Association is a bona fide labor organization voluntarily formed by the employees and voluntarily chosen by a majority of them. There is not a scintilla of evidence, direct or inferential, that petitioner ever in any manner supported the Association or in anywise influenced employees to join it. The direct evidence is all to the exact contrary of the finding that petitioner did so. The Board's decision and order show an inexplicable hostility on the part of the Board to this freely formed and freely chosen labor organization, apparently because of the single fact that it is a local independent labor organization. But the Act protects employees to have that kind of labor organization as well as any other. In the *Link-Belt Company case* (85 L. Ed. (Adv. Op.) 325) it was said (p. 328):

> "An 'inside' union, as well as an 'outside' union may be the product of the right of the employees to

self-organization and to collective bargaining 'through representatives of their own choosing', guaranteed by Section 7 of the Act."

I. P. and L. is by the record in this case shown to be precisely what that quotation says may be the product of the employees' right to self-organization and collective bargaining. The Board's finding in respect to I. P. and L. is wholly wanting support in the evidence and is contrary to the direct evidence. The "cease and desist" order made on said finding is erroneous and not entitled to enforcement, and the court erred in granting enforcement.

(Re: Proposition V (ante)—That the unwillingness of the plant engineer, before there was any organizational activity, to discuss with an unorganized group of six condenser pit operators wage grievances affecting only them individually, was not a violation of any right guaranteed to them by Section 7 of the Act.)

The Board found interference with, restraint and coercion of employees in the exercise of rights guaranteed by Section 7 by reason of the unwillingness of the Harding Street plant engineer to engage in a group discussion of wage grievances with a group of six unorganized condenser pit operators in February, 1937. This was several months before there was any organizational activity and the incident is a single, unconnected plan of six men representing no one but themselves to discuss their own wage grievances with the plant engineer. They did not constitute any appropriate bargaining unit and there is no evidence even that the plant engineer would have had authority to settle any such wage grievance. He did say he would be glad to discuss their individual wage grievances with them individually. Under the circumstances that was permissible and the unwillingness to talk to this small group as a group

did not constitute an unfair practice under the Act. *Midland Steel Products Co. v. N. L. R. B.*, (C. C. A. 6, 1940) 113 F. (2d) 800, 803.

A "cease and desist" order based on that incident is clearly erroneous and not entitled to enforcement and the court erred in granting enforcement.

CONCLUSION

In view of the questions presented and the reasons for allowance of the writ, as set forth in the petition, and for the reasons and upon the authorities set forth in this brief, certiorari should be granted and the case reviewed on the merits; and all parts of the Board's order that are adverse to petitioner should be ordered set aside.

Respectfully submitted,

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Sec. 8 15

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 851

INDIANAPOLIS POWER & LIGHT COMPANY, PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. III, 58–68)[1] is reported in 122 F. (2d) 757. The findings of fact, conclusions of law, and order of the National

[1] Pursuant to stipulation of the parties (R. III, 89–90), the printed record for purposes of the petition for certiorari consists of Appendices "A" and "B" to petitioner's brief in the court below, referred to herein as App. A and App. B, respectively; and the appendix to the Board's brief and the proceedings in the court below contained in "Volume III," referred to herein as R. III.

Labor Relations Board (App. A., 110–149) are reported in 25 N. L. R. B. No. 21.

JURISDICTION

The decree of the court below (R. III, 81–83) was entered on October 29, 1941. The petition for a writ of certiorari was filed on January 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the court below held that it was without power to determine whether the Board's findings are supported by substantial evidence.

2. Whether the court below was required to set out in its opinion the evidence supporting the Board's findings of unfair labor practices.

3. Whether there was substantial evidence to support the Board's findings that petitioner discriminatorily discharged two employees, in violation of Section 8 (3) and (1) of the Act, and engaged in other conduct violative of Section 8 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 15–16.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (App. A, 110–149). The facts, as found by the Board and shown by the evidence, may be summarized as follows:[2]

In February or March 1937 Chief Engineer Goodrich induced a group of petitioner's generating plant employees to abandon their plan to make a collective request for a wage increase; he told two members of the group, Elbreg and Collier, that the men were "absolutely wrong to try to approach him collectively," and that he would confer with them individually but not "as a group" (App. A, 134; App. B, 217–221, 242–244, 565–566). A few months later when Utility Workers Organizing Committee (U. W. O. C.), affiliated with the C. I. O., was seeking to organize employees at the generating plants, various officials of petitioner made remarks intended to discourage adherence to that union. Goodrich and other supervisory employees questioned employees concerning membership in and activities of the U. W. O. C., implied that "violence and bloodshed" and an extended stoppage of work would accompany organization by it (App. B, 224), and asserted that "we are going to try to

[2] In the following statement the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

keep it [the C. I. O.] out as long as we can" (App. B, 253) App. A, 135–136; App. B, 129–137, 148–149, 221–225, 251–256, 294–295, 432–433. At the same time petitioner favored and supported the Indianapolis Power & Light Employees' Protective Association, an "inside" union. It permitted that organization to solicit members on company time and property; supervisory employees made statements to subordinates which identified petitioner's interests with those of the Association and disclosed petitioner's approval of that organization (App. A, 141–143; App. B, 292–293, 318–322, 361–366, 368–372, 375–377, 433–434). The Board found that petitioner, by preventing the employees from presenting the collective request for a wage increase and cautioning them against concerted activity, by its conduct in opposition to the U. W. O. C., and by assisting and supporting the Association, interfered with, restrained, and coerced the employees in violation of Section 8 (1) of the Act (App. A, 134–135, 137, 143).

The Board found further that during a business decline petitioner discriminatorily discharged generating plant employees Elbreg and Collier, in violation of Section 8 (3) and (1) of the Act (App. A, 137–141). These men had been singled out for reprimand by Chief Engineer Goodrich when the group of employees, including themselves, sought to present a collective demand for a wage increase (*supra,* p. 3). They were among the

first to join the U. W. O. C., and they promptly became active in its behalf (App. A, 134–136, 137; App. B, 215–216, 221–222, 224, 241, 244–245, 276); they were elected secretary and president, respectively, of the U. W. O. C. a few months before their dismissals (App. A, 135; App. B, 186, 225, 254); and they had been questioned and warned by petitioner's supervisors concerning the U. W. O. C. (App. A, 135–136; App. B, 223–224, 251–253).

Moreover, the reasons offered by petitioner for its selection of Elbreg and Collier for dismissal were unconvincing. The criteria allegedly followed were merit, efficiency, and length of service with the company (App. A, 138; App. B, 14). But Elbreg and Collier admittedly had greater seniority than at least two of the four other employees doing the same work who were retained (App. A, 138; App. B, 23–24, 590–591), both were competent workers, and there was no suggestion that they were less efficient than the men retained (App. A, 138–139; App. B, 596). And while petitioner also claimed that Elbreg and Collier were selected for discharge because they could not work as general repair men in addition to doing their regular work as condenser pit operators, only one of the four men retained had any repair gang experience, and he had not done such work for eleven years (App. A, 138–139; App. B, 23–24, 591). Finally, the evidence did not support the

claim that alleged deficiencies of "personality" were a factor in the dismissals. The only evidence that Elbreg was deficient in this respect concerned his talking too much, particularly while the U. W. O. C. campaign was going on (App. B, 596, 631–633). Chief Engineer Goodrich admitted, however, that this "never interfered with [Elbreg's] work" and that Elbreg had never been "in trouble" (App. A, 139–140; App. B, 596). Collier had had an altercation with a foreman off company property in 1936, but this had been amicably settled at the time (App. A, 139–140; App. B, 278–280). There was also testimony that Collier, like many other employees, was "more or less grumpy and grouchy" (App. A, 139–140; App. B, 547, 569–571). The Board concluded that Elbreg and Collier were selected for dismissal during the business decline because of their outstanding participation in union activities, and not for the reasons asserted by petitioner (App. A, 140–141).

Upon these findings the Board ordered petitioner to cease and desist from its unfair labor practices, to reinstate Elbreg and Collier with back pay, and to post notices (App. A, 145–149).

The Board also found that petitioner engaged in conduct violative of Section 8 (1) and (3) of the Act at its radio station, which petitioner subsequently sold (App. A, 133). The court below set these findings aside as not adequately supported

by evidence (R. III, 64–67). While we believe the court's decision in this regard to be erroneous,[3] we have not regarded the question as of sufficient importance to warrant a petition for certiorari on behalf of the Board. Accordingly, we have not discussed this portion of the Board's findings here.

On September 9, 1940, petitioner filed in the court below a petition to review and set aside the Board's order (R. III, 5–23). The Board answered, requesting enforcement of the order (App. A, 150–157). On May 14, 1941, the court handed down an opinion and entered an order enforcing the Board's order in full,[4] including the portions based on findings of unfair labor practices at the

[3] The Board found that petitioner, to forestall collective action, granted employees at the radio station an unsolicited wage increase the day before the employees there were to hold a meeting to discuss grievances; that Chief Engineer Williams questioned an employee concerning the meeting; that Williams and Manager Blossom thereafter attended the meeting uninvited and warned the employees against collective bargaining or further such meetings; that Williams later questioned employees concerning union activities at the station; that Blossom requested an employee to act as an informer with respect to unionization; and that petitioner discriminatorily discharged Rennaker, an employee at the station, whose interest in unionization was pronounced and well known to petitioner (App. A, 123–134; App. B, 345–358, 416–420, 425–426).

[4] The court upon request of the Board set aside the "work-relief" provision held invalid in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7 (R. III, 35).

radio station (R. III, 26–35). The court in its opinion, however, mistakenly stated that it was the Board's position that under the Act the court was required to give finality to Board findings if there was "any" evidence whatever to support them, and that the court lacked power to determine whether the findings were supported by "such relevant evidence as a reasonable mind might accept as adequate to support" a conclusion (R. III, 31–32). On May 19, 1941, the Board moved to have the opinion modified in this respect, on the ground that the Board's position had been mistated (R. III, 36–38). The motion declared that it was the Board's view that (*id.*, 37–38):

> * * * while the reviewing court is not empowered to "substitute its judgment on disputed facts for the Board's judgment" (*National Labor Relations Board* v. *Link-Belt Co.*, 61 S. Ct. 358, 365), it is clearly empowered to pass upon the question of whether or not the Board's findings are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229).

On May 26, 1941, petitioner filed a response to the Board's petition (R. III, 40–46), and on May 29, 1941, a petition for rehearing (R. III, 50–56). Thereafter, on September 15, 1941, the court issued its order withdrawing and vacating its prior

opinion and order (R. III, 57), and handed down its final opinion herein. In its final opinion the court omitted the language of the first opinion to which the Board had taken exception, sustained the Board's findings of unfair labor practices at the generating plant, held that the Board's findings of unfair labor practices at the radio station were unsupported by substantial evidence, and set aside the portion of the Board's order based on the latter (R. III, 57–68). A further petition for rehearing filed by petitioner (R. III, 70–76) was denied on October 9, 1941 (R. III, 78), and a decree was entered on October 29, 1941 (R. III, 81–83).[5]

ARGUMENT

1. Petitioner asserts (Pet. 6–7, 31–32, 33–35; Br. 6, 22–23, 25–28, 33–47) that the court below, feeling constrained by recent rulings of this Court (*National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584), considered itself lacking in power to determine whether the Board's findings were supported by substantial evidence—i. e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion—and that petitioner was thereby deprived of the judicial review contem-

[5] An application by the Board to resettle the decree (R. III, 91–98) was denied on November 27, 1941 (R. III, 108).

plated by the Act. The court's first opinion enforcing the Board's order in full does contain language (R. III, 31–32) indicating that this was then the court's view. But it is plain from the proceedings in the court below subsequent to the rendering of that opinion (Statement, *supra*, pp. 7–9), as well as from the face of the court's second opinion, that the court deliberately withdrew the language in question. The final opinion declares that (R. III, 66)—

> * * * it is now conceded that this court is empowered to pass upon the question whether the Board's findings and conclusion in this respect are supported by such relevant evidence as a reasonable mind might accept as adequate to support such findings and conclusion.

This is the test which has received the approval of this Court (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229). That the court below was not indulging in any excessive self-abnegation in its consideration of the evidentiary support for the Board's findings is apparent from the fact that it set aside as unsupported by substantial evidence a portion of the Board's findings and order upheld in its first opinion. See pp. 6–7, 9, *supra*.

2. Petitioner further complains (Pet. 32, 35; Br. 23, 27–29, 44–47) of the failure of the court below to set forth in the opinion "a sufficient review or exposition of the evidence to explain" the

decision. But there is no statutory obligation under the National Labor Relations Act, nor any extra-statutory reason of policy, requiring a reviewing court in upholding Board findings to set out the supporting evidence in a formal opinion. Contrary to petitioner's assertions (*ibid.*), this Court and the circuit courts of appeals have often sustained Board findings and orders without a full, and sometimes without any, exposition of the evidence.[6] See, e. g., *American Manufacturing Co.* v. *National Labor Relations Board,* 309 U. S. 629; *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations Board,* 312 U. S. 660; *National Labor Relations Board* v. *Eastern Footwear Corp.,* 112 F. (2d) 716 (C. C. A. 2); *National Labor Relations Board* v. *Millfay Mfg. Co.,* 97 F. (2d) 1009 (C. C. A. 2); *Norristown Box Co.* v. *National Labor Relations Board,* decided December 1, 1941 (C. C. A. 3); *National Labor Relations Board* v. *Heilig Bros. Co.,* decided January 2, 1942 (C. C. A. 3); *Mexia Textile Mills* v. *National Labor Relations Board,* 110 F. (2d) 565 (C. C. A. 5); *National Labor Relations Board* v. *R. C. Mahon,* decided December 12, 1941 (C. C. A. 6); *Hobart Cabinet Co.* v. *National Labor Relations Board,* decided May 8, 1941 (C. C. A. 6), certiorari

[6] In accordance with uniform Board practice, the Board's decision in the instant case contains a full recital of the relevant evidence in support of the Board's ultimate findings of unfair labor practices.

denied, No. 630, this Term. The courts have also frequently refrained from restating facts administratively determined in cases involving other agencies. E. g., *Texas Electric Ry. Co.* v. *Eastus,* 25 F. Supp. 825 (N. D. Tex.), affirmed *per curiam,* 308 U. S. 512;[7] *Sprague* v. *Woll,* 122 F. (2d) 128 (C. C. A. 7), certiorari denied, No. 592, this Term. Cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146.[8]

3. Finally, petitioner contends (Pet. 3–6, 32–33, 35–36; Br. 6–22, 23–24, 29–32, 47–61), that there is no substantial evidence to support the Board's

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[7] In the *Texas Electric* case a similar point was raised. The trial court found that the determination of the Interstate Commerce Commission under the Railway Labor Act "was supported by substantial evidence in the record before it, and is neither arbitrary or capricious," and deliberately refrained from making findings as to the manner in which the line of railroad was operated. Transcript of Record, October Term, 1939, No. 31, R. 240–241. The carrier moved that these findings be amended so as to set forth in detail the facts relating to the carrier's operations. This motion was denied. *Id.*, 242–243. This ruling was assigned as error, and the point considered in the briefs filed in this Court. See appellant's brief, p. 9; appellee's brief, pp. 32–35. The affirmance *per curiam* is an indication that this point, as well as the main points in the case, was without substance.

[8] In the *Rochester* case this Court stated that:

"Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' * * *."

findings of unfair labor practices. The evidence reviewed in the Statement (*supra,* pp. 3–6) affords full support for the challenged findings. In any event petitioner's challenge to the findings presents no question of general importance. Nor is there any conflict, as petitioner asserts (Pet. 36; Br. 30–31, 50–53), with cases in other circuit courts of appeals overturning Board findings; these cases turned, as does the present case, upon their particular facts.[9]

CONCLUSION

The decision below, insofar as it sustained the Board's findings and order, is correct and presents neither a conflict of decisions nor any question

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[9] Petitioner relies particularly upon an alleged conflict with *Nevada Consolidated Copper Corp.* v. *National Labor Relations Board*, 122 F. (2d) 587 (C. C. A. 10), certiorari granted January 19, 1942, No. 774, this Term. The *Nevada* case held that, "If the evidence was as consistent with the hypothesis asserted by petitioner as the one upon which the Board predicated its order, it established neither" (*id.*, at 598). This erroneous standard does, of course, conflict with the test applied in the instant case, but only because and to the same extent that it conflicts with all of the prior decisions of this Court and hundreds of decisions in circuit courts of appeals accurately defining the scope of review under the National Labor Relations Act. This Court obviously need not review every decision applying the approved and proper rule because of the "conflict" created by a single erroneous decision. The Court has, moreover, decided to review the *Nevada* case. In any event the facts of the instant case and of the *Nevada* case are entirely different.

of general importance. The petition should, therefore, be denied.

Respectfully submitted.

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JANUARY 1942.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> SEC. 10.
>
> * * * * *
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order

requiring such person to cease and desist from such unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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No. 851

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

INDIANAPOLIS POWER & LIGHT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER, INDIANAPOLIS POWER & LIGHT COMPANY

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REPLY BRIEF FOR PETITIONER, INDIANAPOLIS POWER & LIGHT COMPANY

QUESTIONS PRESENTED

The statement at page 2 of the brief for the Board of questions presented is neither accurate nor complete. There are five separately numbered questions stated at pages 31-33 of the petition for certiorari as questions presented by the petition. Questions 4 and 5 (pp. 32-33 of petition) are ignored in the brief for the Board. The

first two questions stated in the Board's brief are not accurate restatements of questions 1 and 2 stated at pages 31-32 of the petition and are not the actual questions which the record presents on those subjects. The third question stated in the Board's brief on the matter of sufficiency of the evidence to support the findings in question does not include subsidiary findings of the Board as does number 3 stated at page 32 of the petition.

Comparison

Substance of the Questions Stated in Petition	Substance of the Questions Stated in Board's Brief
1. In respect to the Board's findings relating to *generating plant employees* (not those relating to the disposed of radio station) whether "recent rulings of the Supreme Court" rendered the lower court "powerless to disturb" the Board's findings (as both opinions below hold) and precluded it from making its own independent determination of the question of the legal sufficiency of the evidence to support said findings.	1. Whether it was held below that the court was without power to determine whether the Board's findings (not limited to those relating to generating plant employees) are supported by substantial evidence.
2. Whether there was such departure from the usual and accepted course of judicial proceedings in this type of case, by the lower court's failure to make its own independent determina-	2. Whether the lower court was required to set out in its opinion "the evidence supporting the Board's findings of unfair labor practices."

tion of the question whether said findings (those relating to generating plant employees) are supported by substantial evidence and by its failure to point out in its opinion "legally sufficient evidence" to support said findings so as to call for the exercise of this court's power of supervision.

3. Whether said findings (relating to generating plant employees), including the subsidiary findings, are supported by substantial evidence.

3. Whether there was substantial evidence to support the Board's findings that petitioner discriminatorily discharged two employees, in violation of Section 8 (3) and (1) of the Act, and engaged in other conduct violative of Section 8 (1).

4. Whether the Board must overcome with evidence the direct and positive evidence showing a reasonable and lawful explanation of the lay-off of Collier and Elbreg, who admitted they had not informed management of their union affiliation and of whose affiliation management had no knowledge, and whether the finding of discriminatory discharge may stand in the absence of such contrary evidence.

(Ignored.)

5. Whether the plant engineer's unwillingness to discuss wages with a "group" of six unorganized employees, months before there was any organizational activity, constituted a violation of their rights as guaranteed by Section 7 of the Act.	(Ignored.)

Each of the five questions stated at pages 31-33 of the petition is warranted by the record, and is of importance in the administration of the National Labor Relations Act, as well as of importance in this particular case.

STATEMENT OF THE CASE

The "STATEMENT" at pages 3-9 of the brief for the Board is far from adequate either as a basis for determining whether the petition for certiorari should be granted or as a basis for determining any of the questions presented on the merits. For a full and correct statement of the case, including a statement of the evidence, and lack of it, relating to the subject matter of the findings in question, attention is respectfully directed to the "Concise Statement of the Case" which appears at pages 2-22 of petitioner's brief.

Some of the important facts omitted from the statement in the brief for the Board and some of the errors therein will now be shown. The statement at pages 7-22 of petitioner's brief includes the omitted matters and correct statements of the evidence with specific references to the Record.

Omitted in connection with the incident referred to at page 3 of the Board's brief, when early in 1937 a plant

engineer expressed unwillingness to confer with six unorganized employees as a group on the subject of their wages, are the facts that this occurred several months before there was any organization activities; that there is no evidence that petitioner ever refused to engage in collective bargaining with any representatives chosen by its employees, but on the contrary petitioner did bargain collectively and contract with the first and only labor organization that asked for recognition; that petitioner was not charged with refusing to bargain collectively and no effort was made to disestablish the labor organization with which the contract was made.

Omitted in connection with the remarks of the then plant engineer (Goodrich) and of other supervisory employees referred to at pages 3-4 of the Board's brief, is the fact that when it became apparent to the management in July, 1937, (after said remarks are said to have been made) that generating plant employees were talking about organization while on duty and killing time on account of it, the plant engineer (Goodrich) reported the situation to the General Manager and that the President and the General Manager then determined the company's authoritative policy to be that the employees "*could join or not join, do as they liked about joining organizations, but they must not hold any meetings or carry on any meetings on the company property,*" and that Goodrich was instructed to call a meeting of said plant employees and communicate those instructions to them; that Goodrich called such meeting on July 8, 1937, and so told the employees at that meeting.

The statement at page 4 of the Board's brief that petitioner favored and supported the employees' organization, permitted it to solicit members on company time

and property and that supervisory employees conveyed to subordinates petitioner's approval of that organization, has no support whatever in the evidence and is exactly contrary to what the Board's own witnesses, Gipe and Kirkpatrick, testified to (App. B, pp. 70-112, and pp. 112-128). The trial examiner expressly found (App. A, p. 61) that "The evidence does not support the conclusion, however, that respondent itself encouraged the formation of the Association or coerced its employees into joining it, as alleged in the complaint."

Omitted in connection with that part of the statement dealing with Collier and Elbreg (pp. 4-6, Board's brief) are the following undisputed important facts: That neither Collier nor Elbreg had ever informed anyone in the management that they were affiliated with U. W. O. C.; that there is no evidence whatever that prior to or at the time of their lay-off anyone in the management knew they were so affiliated; and that Goodrich, who selected them for lay-off along with many others, testified that he had no knowledge that either of these men belonged to that union until long after they were laid off. Omitted also in this connection is the fact that in a series of written orders in late 1937 the General Manager required all department heads to reduce personnel due to the economic recession of that time and that in one of these orders he furnished the basis on which selections for lay-offs should be made as follows:

> "In laying off plant employees, however, the generating system as a whole is to be the governing basis. That is, all plant employees should be considered on the basis of merit, efficiency and length of service with the company. Necessary transfers between plants should be made as far as possible to accomplish this policy."

Omitted also is the fact that Goodrich testified that all those laid off pursuant to the General Manager's orders, including Collier and Elbreg, were selected on the foregoing basis in the exercise of management judgment, without any knowledge or thought of their affiliation, or non-affiliation, with any labor organization; that a total of 70 were so laid off, of which number, it was revealed thereafter, five belonged to U. W. O. C., and 54 to the employees' Association.

It is entirely clear that the Board has at no time considered the "whole complex of activities" or based its decision "on the totality of the Company's activities during the period in question". See, *N. L. R. B. v. Virginia Electric & Power Co.*, — U. S. —, 86 L. Ed. 309, 311.

ARGUMENT

The argument in the brief for the Board is confined to the three questions which are set forth at page 2 of that brief. In this reply brief under the heading of "Questions Presented" it has been made clear that there are five separately numbered questions presented by the petition, and that those numbered 4 and 5 are completely ignored by the brief for the Board.

Question number 4, ignored in the Board's brief, is the basis for specification of error numbered 4 (p. 23, petitioner's brief), and is the subject matter of Proposition 4 (pp. 30-31, petitioner's brief). Said Proposition 4, along with Proposition 3, is the subject of the argument extending from pages 47 to 60 of petitioner's brief. Petitioner believes that said question numbered 4 and what is said therein in petitioner's brief, should receive consideration because of the importance of that question in the administration of the Act as well as in this particular case.

Question number 5, ignored in the Board's brief, is the basis for specification of error numbered 5 (p. 24, petitioner's brief), and is the subject matter of Proposition 5 (pp. 31-32, petitioner's brief). Said Proposition 5 is argued at pages 60-61 of petitioner's brief. Petitioner believes said question numbered 5 should receive the consideration of the court because of its importance in the administration of the Act as well as in this case.

Question number 1, as it is stated in the petition (pp. 31-32) is the basis for specification of error numbered 1 (pp. 22-23, petitioner's brief), and is the subject matter of Proposition 1 (pp. 25-27, petitioner's brief). Said Proposition 1 is argued at pages 33-44 of petitioner's brief. At

pages 37-40 the part of the Court's last opinion dealing with findings pertaining to *generating plant employees* is set forth. It is clearly apparent from that part of the opinion that the lower court deemed itself precluded (erroneously) by "recent rulings of the Supreme Court", particularly by rulings in *N. R. L. B. v. Link-Belt Co.*, 311 U. S. 584; 85 L. Ed. 368 and *N. L. R. B. v. Waterman S. S. Co.*, 309 U. S. 206; 84 L. Ed. 704, from setting aside the finding respecting Collier and Elberg (generating plant employees) even though as a matter of law it did not believe said findings to be supported by substantial evidence.

What else can one make of such language in the final opinion as the following?

> "We have always presumed that this provision authorized us to correct what we in good faith thought was error of law in the Board's findings and order, including the determination whether the Board's findings were based on more than a scintilla of evidence, or upon such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. See *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440; *Edison Co. v. Labor Board, supra*, 229, 230.
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> In *National Labor Relations Board v. Waterman S. S. Co.*, 309 U. S. 206, the Court said: '* * * Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with the general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act.' This language was quoted in *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584.

> * * * Under these decisions we are powerless to disturb the Board's findings with respect to Collier and Elberg."

True in its final opinion the Court did hold that the findings as to radio station WFBM and radio technician Renmaker were not supported by substantial evidence, but the same opinion conclusively discloses that there was not a similar review to determine the question whether the findings relating to the generating plant employees are supported by substantial evidence. It is plain that the lower court failed to make its own independent determination of the law question whether the findings relating to generating plant employees are supported by substantial evidence. On this subject the second opinion reads to all intents the same as did the first.

It is also clear that if the whole picture of the facts in evidence (pp. 7-22, petitioner's brief) is considered, it cannot reasonably be said that the findings relating to the generating plant employees are supported by substantial evidence. It is also clear from the Board's order itself that it is not based "on the totality of the Company's activities during the period in question". Instead, the findings and order ignore important facts and rest on distortions of fragments. This Court recently reversed a case under the Act where it was not clear that the Board had considered "the whole complex of activities" in reaching its conclusions. *N. L. R. B. v. Virginia Electric & Power Co.* — U. S. —; 86 L. Ed. 306, 311. In the instant case it is clear that th Board did not consider "the whole complex of activities" in respect to the discharge of Collier and Elberg or in respect to interference with rights of generating plant employees. It is also clear that the lower court erroneously deemed itself balked from going into the matter and giving relief to which the petitioner is entitled by reason

of the lower court's misinterpretation of the decisions of the Supreme Court.

Question number 2, as it is stated in the petition (p. 32) is the basis for specification of error number 2 (p. 23, petitioner's brief), and is the subject matter of Proposition 2 (pp. 27-29, petitioner's brief). Said Proposition 2 is argued at pages 44-47 of petitioner's brief. That question is not, as stated in the brief for the Board, whether opinions are required to set out "the evidence supporting the Board's findings." The question rather is, (p. 32, petition) whether the failure by the lower court to make its independent determination of the question of sufficiency of evidence *and* to point out "legally sufficient evidence" constitute such a departure from the accepted and usual course of judicial proceedings in this type case, so as to call for the exercise of this Court's power of supervision. At pages 44-47 of petitioner's brief it is shown that the usual and accepted course is for the reviewing court to make such independent determination and to point to evidence deemed legally sufficient to support the findings upheld. It is there also shown that the lower court did neither of these things in respect to the findings relating to generating plant employees. Petitioner believes said question number 2 is warranted by the record and merits consideration.

The remaining of the five questions presented is number 3, which is, whether said findings, including those subsidiary thereto (relating to generating plant employees), are supported by substantial evidence under the test of the established criterion. Said question is the basis for specification of error number 3 (p. 23, petitioner's brief) and is the subject matter of Proposition 3 (pp. 29-30, petitioner's brief). Said Proposition 3 is argued at pages 47-60 of petitioner's brief. It is there demonstrated that said

findings are as a matter of law not supported by substantial evidence but that they are contrary to all of the substantial evidence.

That question is important not only in this particular case, but in the administration of the Act as well, since the Board obviously did not consider such things as the company's authoritative policy of according its employees full freedom in the matter of joining, or not joining, labor organizations, or the undisputed fact that Collier and Elbreg had never informed anyone in the management that they belonged to C. I. O. and that the management had no knowledge that they were so affiliated until after they had been selected for lay off along with many others under economic necessity. An order not based on a consideration of all of the relevant facts should not be allowed to stand. *N. L. R. B. v. Virginia Electric & Power Co.*, — U. S. —; 86 L. Ed. 306, 311.

It is respectfully submitted that the questions presented by the petition for certiorari are warranted by the record and that they are of sufficient importance in the administration of the Act, as well as in this case, to merit consideration by the Supreme Court.

It is respectfully requested that the petition for certiorari be granted, and that upon review, the case be reversed as is in said petition prayed.

Respectfully submitted,

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